DISTRICT COURT DEPARTMENT OF THE TRIAL COURT

STANDARDS OF JUDICIAL PRACTICE

SENTENCING AND OTHER DISPOSITIONS

THE COMMITTEE ON STANDARDS

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September 1984

Administrative Office of the District Court

District Court Department of the Trial Court

ADMINISTRATIVE REGULATION

No. 3-84

Subject: **PROMULGATION OF STANDARDS OF JUDICIAL PRACTICE, SENTENCING AND OTHER DISPOSITIONS**

Administrative Regulation No. 3-84 is hereby promulgated as follows, to be effective forthwith:

The provisions of the Standards of Judicial Practice applicable to Sentencing and Other Dispositions are promulgated herewith for use in the District Court.

SAMUEL E. ZOLL
Chief Justice
District Court

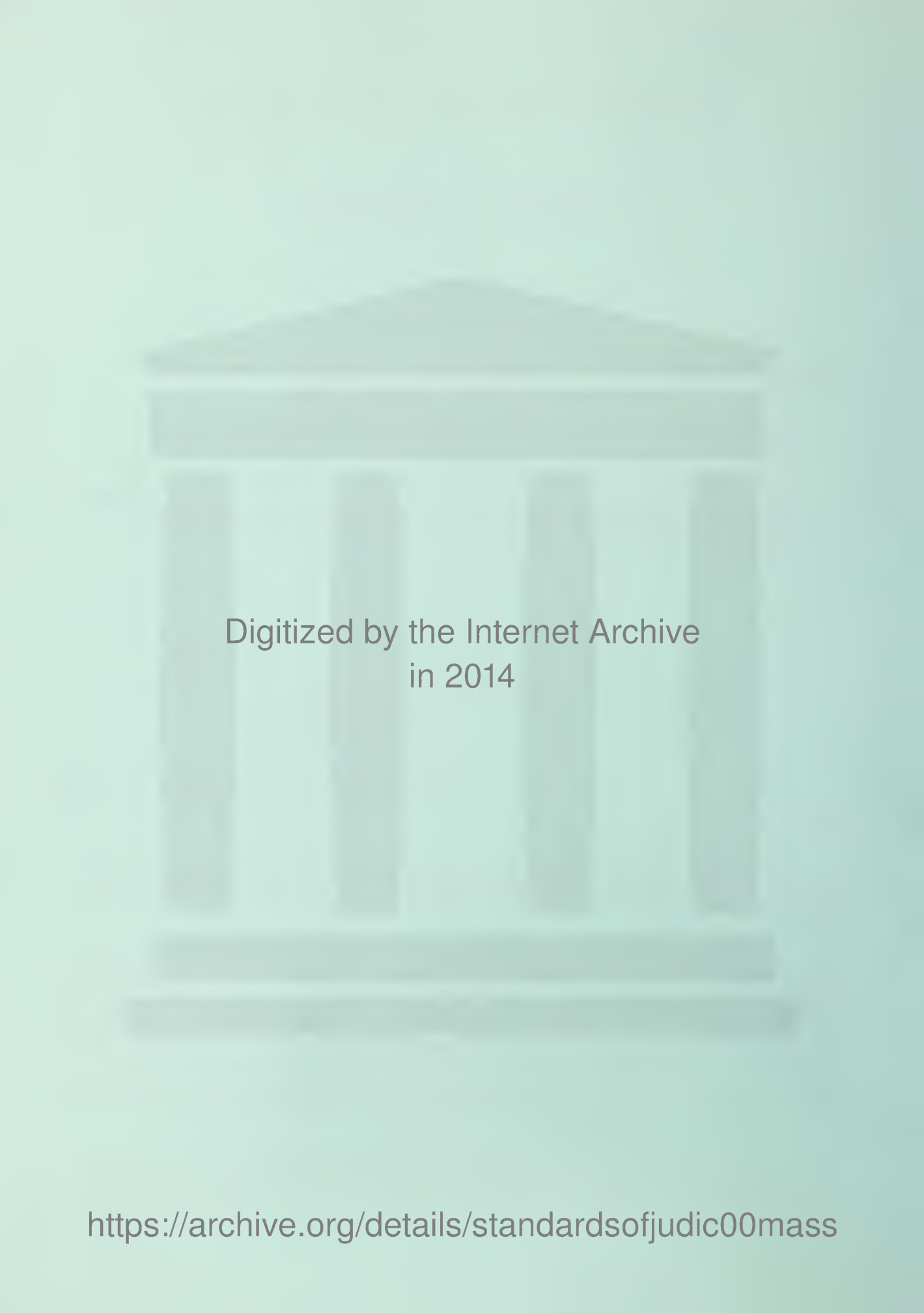
Promulgated: September 10, 1984

Note:

I am pleased to be able to promulgate this volume of the Standards of Judicial Practice concerning sentencing and other dipsositions.

It is hoped that these standards will contribute to better understanding of the complex procedural issues and the nomenclature surrounding the sentencing process in the District Court. The main objective of these standards is to increase uniformity of understanding of that process. Although they are "sentencing" standards, they address the procedural side exclusively and not the question of what the "correct" sentence in a particular case should be, the latter being a matter that must be reserved to the sound discretion of the court.

I want to thank the members of the Committee on Standards for this latest example of their scholarship. Special thanks are also due to Toby J. Kamens, formerly with this office and



now with the office of the Chief Administrative Justice, who stayed with this project even after she changed positions. Finally, and especially, I want to thank Hon. Daniel H. Rider, chairperson of the committee, who also continued to work on the project following his retirement from the bench. However, his commitment to this project will come as no surprise to all of Judge Rider's colleagues, who have known him as a tireless and dedicated jurist during his fifteen years on the bench, his eleven years on the Committee on Standards and his seven years as its chairperson.

While not mandatory in application in the sense of rules, the Standards of Judicial Practice represent the qualitative consensus reached by the Committee on Standards as to the various aspects of the sentencing process. As such, each court should strive for compliance with the standards and should treat them as a statement of desirable practice which should be departed from only with good reason. Many references are made throughout the standards to provisions of statutory and case law, which, of course, must be observed.

The standards may be amended from time to time. Your comments and suggestions on how they may be improved and on particular practices which should be recommended therein should be sent to the Administrative Office.

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GENERAL PROVISIONS

Standards for Sentencing
and Other Dispositions
Standard 1:00

1:00 General. THESE STANDARDS ADDRESS THE CONVENTIONAL WAYS IN WHICH DISTRICT COURTS CAN DISPOSE OF CRIMINAL CASES. ALTERNATIVE SENTENCING, WHICH ENCOMPASSES PARTICULAR REHABILITATIVE METHODS OF DISPOSITION, IS NOT COVERED.

COMMENTARY

The purpose of these standards is to set forth in an orderly way the conventional forms of disposition available to the Judges of the District Court, to outline the legally required procedures and approaches for each, and, for some forms of disposition, to delineate certain procedures and approaches in areas that are otherwise not well defined.

The standards use the term "disposition" to include all methods by which a criminal case may be concluded by a Judge. The term "sentencing" or "sentence" is used to refer to those types of dispositions that occur after a finding of guilty.

These standards are written from the perspective of a District Court Judge sitting in a bench session. The dispositions included herein are equally applicable to a jury waived session and, with the exception of a continuance without a finding, to a jury trial after the jury has returned a guilty verdict.

No exercise of judicial authority is more important or more visible than that involving the disposition of criminal cases. The judicial decisions underlying criminal dispositions affect the lives and interests of not only the individual defendants involved but also the victims of crime and society in general.

The importance of criminal dispositions is reflected in the wide range of options usually available to the court. These options reflect the variety of circumstances that may be involved in each case. These standards are intended to catalog and describe the various forms of dispositions.

Basically there are four types of dispositions: acquittal, dismissal, sentencing and continuance without a finding.

"Acquittal" is not covered by these standards; it results automatically when the prosecution fails to prove guilt beyond a reasonable doubt. "Sentencing" is covered, and refers to the action taken by the court after a defendant has been found guilty. "Dismissal" lies between acquittal and conviction. In some instances it is almost synonymous with acquittal. These instances involve dismissal based on the failure to prosecute or on a fatal defect in the Commonwealth's case. In other instances, dismissal may follow a hearing of evidence and some form of "order," with no formal determination of guilt ever being made. The legally required procedures for dismissal are not covered by these standards, but by the District Court Standards of Judicial Practice: Arraignment (August 31, 1977). The practice of "continuing a case without a finding," conditioned on compliance with certain orders or conditions, is also covered in these standards. While the order of the court may seem to be a "sentence," it cannot be considered such because there has been no plea or determination of guilt. See Standard 3:00 et seq.

Standards for Sentencing
and Other Dispositions
Standard 1:01

1:01 Basis for Sentencing and Other Dispositions. THE DUTY OF A JUDGE IN A TRIAL OF A DEFENDANT CHARGED WITH A CRIME IS TO DETERMINE THE DEFENDANT'S GUILT OR INNOCENCE AND, IF THE DEFENDANT IS FOUND GUILTY, TO SANCTION THE DEFENDANT BY IMPOSING A PENALTY WITHIN THE RANGE ALLOWED BY LAW. DISPOSITIONS OF CRIMINAL CASES THAT DO NOT INVOLVE A FORMAL DETERMINATION OF GUILT OR THAT DO NOT IMPOSE SANCTIONS AFTER SUCH A FORMAL FINDING OF GUILT SHOULD BE CONSIDERED EXCEPTIONS TO THIS GENERAL RULE.

IN DETERMINING AN APPROPRIATE DISPOSITION IN A CASE WHERE A FINDING OF GUILTY IS JUSTIFIED, WHETHER OR NOT IT IS FORMALLY ENTERED, A JUDGE SHOULD ALWAYS CONSIDER THE PURPOSE OR GOAL TO BE ACHIEVED. IT IS GENERALLY AGREED THAT THERE ARE FOUR GOALS OF SENTENCING: PUNISHMENT, DETERRENCE, PROTECTION (OR INCAPACITATION) AND REHABILITATION. IT IS FOR THE JUDGE MAKING THE DISPOSITION TO DECIDE WHICH GOAL OR COMBINATION OF GOALS IS APPROPRIATE FOR THE CASE. THE DISPOSITION SHOULD FACILITATE ACHIEVEMENT OF THE GOAL THE JUDGE HAS IN MIND.

COMMENTARY

It is not uncommon that in courts that hear a large volume of minor criminal offenses the distinction between the separate tasks of adjudicating guilt or innocence and passing sentence (if guilt is determined) becomes blurred. However, these functions must remain distinct in order to meet constitutional

requirements and satisfy the legislative mandates. Criminal procedure rests on the premises that courts will determine whether those accused of certain offenses in fact committed those acts, and, if it is found that they did, will punish them in accordance with the law.

At present the court has great latitude regarding the second of these two tasks, namely, sentencing. Punishment may be tempered as the court sees fit, and purposes other than punishment may be pursued. Dispositions wherein judgment of guilt or innocence is avoided and no sanction is imposed, though proscribed acts have been committed, must be seen as exceptions to this general framework.

1:02 Considerations in Sentencing and Other Dispositions.

WITH THE EXCEPTION OF RESTRICTIONS REGARDING CERTAIN SEALED RECORDS NOT AVAILABLE IN PROBATION REPORTS (SEE STANDARD 2:01), THE SENTENCING JUDGE MAY CONSIDER VIRTUALLY ANY INFORMATION THAT WOULD AID HIM OR HER IN UNDERSTANDING THE DEFENDANT, DETERMINING THE GOAL(S) OF THE DISPOSITION(S), AND DECIDING ON THE LIKELIHOOD OF REHABILITATION.

COMMENTARY

The "sentencing judge should not seek personally to obtain sentencing information but should rely on the parties, the probation department, and other social service agencies." Comm. v. Coleman, 390 Mass. 797, 809, 461 N.E.2d 157, 164 (1984). The pro se defendant, or defense counsel, may provide information to the court in mitigation of punishment. Mass. R. Crim. P. 28(b). See Standards 2:00-2:01 for a review of the probation officer's role in dispositions, and Standard 9:05 for a discussion of the victim's opportunity to be heard.

The following portion of the Supreme Judicial Court's opinion in Osborne v. Comm., 378 Mass. 104, 105, 389 N.E.2d 981, 988-989 (1979), lists the many points that the sentencing Judge may consider:

> The sentencing judge, in his discretion, may take into account any subsequent good behavior of the defendant. See Commonwealth v. Celeste, 258 Mass. 307, 310 (1970) (sentencing judge may consider hearsay, the defendant's behavior, family life, employment, and various other factors); United States v. Tucker, 404 U.S. 443, 446 (1972) (scope of sentencing judge's inquiry is 'largely unlimited either as to the kind of information he may consider, or the source from which it may come'); Williams v. New York, 337 U.S. 241,

> 245 (1949) (sentencing judge may consider any factors that throw light on the defendant's 'life, health, habits, conduct, and mental and moral propensities'). Cf. Mass. R. Crim. P. 28(d)(2), effective July 1, 1979 ('the [presentence investigation] report shall include such other available information as may be helpful to the court in the disposition of the case').10/
>
> * * *
>
> 10/ It is also permissible for a sentencing judge to take into account a defendant's misconduct subsequent to the crime or crimes for which he is being sentenced (see Commonwealth v. Franks, 372 Mass. 866 [1977]; Commonwealth v. LeBlanc, 370 Mass. 217, 220-221, 225 n.8 [1976]), provided the judge does not punish the defendant either for exercising his right to appeal (North Carolina v. Pearce, 395 U.S. 711 [1969]) or for a different crime from that for which he is to be sentenced (Commonwealth v. Sitko, 372 Mass. 305, 313 [1977]; McHoul v. Commonwealth, 365 Mass. 465 [1974]).

The sentencing Judge should not presume a defendant's guilt and impose a penalty for an untried criminal offense, Comm. v. Souza, 390 Mass. 813, 817, 461 N.E.2d 166, 169 (1984); nor should the Judge consider the defendant's alleged perjury while testifying in imposing a sentence for a crime. Comm. v. Coleman, supra; Comm. v. Souza, supra; Comm. v. Gresek, 390 Mass. 823, 829-32, 461 N.E.2d 172, 176-77 (1984).

PROBATION REPORTS

Standards for Sentencing
and Other Dispositions
Standard 2:00

2:00 General. AFTER A FINDING OF GUILTY OR A FINDING THAT THE EVIDENCE WARRANTS A FINDING OF GUILTY, THE JUDGE SHOULD RECEIVE INFORMATION FROM THE PROBATION OFFICE PRIOR TO IMPOSING SENTENCE OR OTHER DISPOSITION.

COMMENTARY

This standard reflects the legal duty of the probation office to provide the court with dispositional information. G.L. c. 276, s. 85. This duty exists regardless of the seriousness of the offense.

A written presentence report may be requested by the trial Judge following a finding of guilty or a finding of sufficient facts to warrant a finding of guilty. Cf. Mass. R. Crim. P. 28(d)(2).

The Judge has the sole responsibility for imposition of the sentence. However, a Judge may authorize a probation officer to make detailed recommendations as to disposition.

Standards for Sentencing
and Other Dispositions
Standard 2:01

2:01 Form and Contents of the Record and Presentence Probation Reports. GENERALLY, THE RECORD, IN CONJUNCTION WITH THE PRE-TRIAL INTAKE REPORT, SHOULD CONTAIN ADEQUATE INFORMATION FOR THE JUDGE'S DISPOSITIONAL DECISION. SUCH RECORD, INCLUDING A STATEMENT AS TO A DEFENDANT'S PRIOR RECORD OF CONVICTIONS, MAY BE MADE ORALLY IN OPEN COURT. IN ALL CASES, AFTER A FINDING OF GUILTY OR A FINDING THAT THE EVIDENCE WARRANTS A FINDING OF GUILTY, THE JUDGE SHOULD AVAIL HIMSELF OR HERSELF OF THE PROBATION RECORD.

WHEN THE JUDGE DESIRES MORE EXTENSIVE INFORMATION ABOUT A DEFENDANT THAN THE RECORD AND PRE-TRIAL INTAKE REPORT, THE JUDGE SHOULD CONTINUE THE CASE FOR DISPOSITION AND REQUEST THE PROBATION OFFICE TO PREPARE A MORE IN-DEPTH PRESENTENCE REPORT.

A PRESENTENCE REPORT SHOULD INCLUDE, IN ADDITION TO PRIOR RECORD, INFORMATION ON THE DEFENDANT'S PERSONAL HISTORY, INCLUDING FAMILY, EMPLOYMENT, EDUCATION AND MILITARY SERVICE. IN CERTAIN CIRCUMSTANCES, THE PRESENTENCE REPORT WILL INCLUDE A WRITTEN VICTIM IMPACT STATEMENT PREPARED BY THE DISTRICT ATTORNEY. THIS STATEMENT SHOULD BE DISTINGUISHED FROM THE VICTIM'S STATUTORY RIGHT TO PRESENT AN ORAL OR WRITTEN STATEMENT TO THE COURT RELATIVE TO DISPOSITION IN CERTAIN SPECIFIC TYPES OF CASES.

WHERE PROBATION HAS BEEN UNABLE TO OBTAIN INFORMATION WHICH IT CONSIDERS MATERIAL, IT SHOULD SO INFORM THE JUDGE.

COMMENTARY

The probation office has a legal duty to report to the Judge on each defendant prior to sentencing. In the case of a defendant charged with an offense which is punishable by a sentence of imprisonment for more than one year, the probation officer must present to the court information relative to the defendant's prior criminal convictions and "all other available information relative thereto." G.L. c. 276, s. 85. There is no legal prohibition to these reports being made aloud in open court. Obviously, the scope of such reports, within certain minimum requirements recommended in this standard, may vary in relation to the seriousness of the offense charged. Unless a written presentence report is requested by the Judge, the probation record card and pre-trial intake report may satisfy in most instances the Judge's dispositional needs.

Mass. R. Crim. P. 28(d)(2) reviews the contents of a presentence report as follows:

> The [presentence] report . . . shall contain any prior criminal or juvenile prosecution record of the defendant, but shall not contain any information relating to criminal or juvenile prosecutions in which the defendant was found not guilty. In addition, the report shall include such other available information as may be helpful to the court in the disposition of the case.

See also G.L. c. 276, s. 85 for a similar provision.

The presentence report must contain a written victim impact statement prepared by the District Attorney if a defendant is convicted of a felony which has an "identified victim" whose whereabouts are known or of motor vehicle homicide pursuant to G.L. c. 90, s. 24G(b). The statement will include the name of the victim, documentation of the net financial loss of the victim, if any, and the impact of the crime on the victim's emotional state, personal welfare and family relationship. G.L. c. 279, s.4B. The victim impact statement may be similar to the oral or written statement prepared by the victim or the victim's representative pursuant to G.L. c. 279, s. 4B. See Standard 9:05.

A defendant may examine those portions of a probation report which pertain to his or her prior criminal record, but has no statutory right under G.L. c. 276, s. 100 and no constitutional right to examine information obtained by the probation office from the defendant and other sources included in the probation report. Comm. v. Martin, 355 Mass. 296, 244 N.E.2d 303 (1969).

Mass. R. Crim. P. 28(d)(3) requires the presentence report to be made available to the prosecutor and counsel for the defendant prior to disposition, but authorizes the Judge to except from disclosure the following:

> parts of the report which are not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which if disclosed, might result in harm, physical or otherwise, to the defendant or other persons. If the report is not made fully available, the portions thereof which are not disclosed shall not be relied upon in determining sentence.

A sealed record may be unsealed and reviewed by the court in the course of imposing a sentence after a finding of guilty has been entered by the Judge. The matter of sealed records is considered in Standard 9:06.

Probation officers should refer to the regulations and forms prescribed in the Probation Manual issued by the Commissioner of Probation.

CONTINUANCE WITHOUT A FINDING

3:00 General. CONTINUANCE OF A CRIMINAL CASE WITHOUT A FINDING IS A TECHNIQUE WHICH, IN APPROPRIATE CASES, CAN SATISFY THE INTERESTS OF JUSTICE. IF THIS DISPOSITION IS USED, IT SHOULD BE ACCOMPANIED BY THE SAMPLE FORM, "AGREEMENT FOR CONTINUANCE WITHOUT A FINDING."

COMMENTARY

The constitutionality of continuing a case without a finding was upheld by the Supreme Judicial Court in Comm. v. Brandano, 359 Mass. 332, 269 N.E.2d 84 (1971), as long as specified standards of procedure are met. See Standard 3:04. "Continuing a case without a finding" is infrequently referred to in statutes and case law. However, for specific references to this practice, see G.L. c. 90, s. 24(1)(a)(1), G.L. c. 119, s. 58 and G.L. c. 276A, s. 5. Unless prohibited by the statute defining the offense with which the defendant is charged, a case may be continued without a finding. See Standard 7:10 on mandatory sentencing for examples of statutes which proscribe continuances without a finding.

The technique of continuing a case without a finding constitutes a decision by the Judge to forego a formal finding of guilty, even though it has been determined that, as a factual matter, the evidence warrants a finding of guilty. A case should be continued without a finding only when the factors involved, including but not limited to the defendant's background, the nature of the offense, and the prior record of the defendant, make a finding other than guilty appropriate.

The Judge should impose conditions on the continuance without a finding appropriate to the facts of each case. The defendant may be placed under such probation supervision as is necessary to insure his or her compliance with the conditions. These conditions may include relevant conditions of probation, even though the defendant may not be on "formal probation."

The conditions of a continuance without a finding should address the problem underlying the behavior with which the defendant is charged, and should be such that the defendant's willingness and ability to correct this behavior will be tested. Where appropriate, the conditions also should be aimed at reimbursement for damage done.

Some effort should be made by the Judge to impose conditions aimed at correcting the behavior at issue, redressing the harm done, or both. Unless some specific conditions are imposed, such as the standard conditions of probation or special conditions warranted under the circumstances, it is likely that the defendant will conclude that the process has had little practical effect on him or her.

The sample "Agreement for Continuance Without a Finding," is a voluntary agreement among the court, the defendant, his or her defense counsel, if any, and the prosecuting officer. The Judge, after a finding of sufficient facts, may continue the case without entering a finding of guilty subject to the defendant's compliance with certain conditions established by the court. The defendant, as a condition of obtaining the continuance without a finding, agrees to abide by the court's terms. These terms include both a finding of guilty and a sentence (announced by the trial Judge and inserted in the form) which is the trial Judge's recommended sentence if the defendant violates one or more of the conditions of the continuance without a finding and then comes before another Judge. In the event that the Judge subsequently presiding finds a violation of the conditions of the continuance, the defendant has agreed to accept the finding of guilty and the sentence which was previously inserted in the form. In addition, the defendant has agreed to waive de novo appeal of the finding and the sentence on the sample form.

SAMPLE FORM

AGREEMENT FOR CONTINUANCE WITHOUT A FINDING

The undersigned defendant has signed a written waiver of trial by jury in the first instance and has entered a plea of not guilty, and the judge has found sufficient facts to warrant a finding of guilty after hearing. If the defendant admits sufficient facts, [s]he understands that [s]he is waiving his or her rights to confront and cross-examine witnesses and to call witnesses on his or her behalf. A police report or stipulation of facts of the parties or statement of facts of the trial Judge is attached. The court has continued the case without a finding, subject to the conditions established by the court and agreed to by the defendant.

1. During the period of continuance the defendant shall shall not be under supervision of the probation office and must:

A. Obey all local, state and federal criminal laws and court orders.

B. Notify the probation office of any change of address or employment; report to the assigned probation officer as required; allow said probation officer to visit at the residence of the defendant at reasonable hours; and obtain permission of said probation officer before leaving the Commonwealth.

C. Pay all costs, fees and restitution ordered by the court, said amounts to be paid in accordance with the following schedule: _____

_____

D. Comply with the following additional conditions, if any: _____

_____

_____

2. The defendant must appear in court on the continuance date shown below, unless ordered otherwise by the court. If the defendant fails without sufficient excuse to appear in court on that date, a default will be entered and a warrant of arrest may issue.

3. If the court finds, after a hearing, that the defendant has failed to meet one or more of the conditions of this continuance, the defendant understands that the continuance without a finding will be terminated, the defendant will be found guilty of the complaint(s) that have been continued, and it is recommended that the following sentence(s) be placed into effect: _____

_____

_____

_____

The court, after hearing evidence which warrants a finding of guilty against the above defendant, enters a continuance without a finding and orders that the above complaint(s) be continued until _____, subject to the conditions of the continuance stated above, with the understanding that the court will dismiss the complaint(s) on the above continuance date if the defendant complies with the conditions of the continuance. The court further certifies that these conditions have been explained to the defendant, who has represented to the court that [s]he understands and agrees to these conditions.

Defendant states that [s]he has read and understands the conditions of the continuance without a finding set forth above and agrees to observe them, and waives his or her right to a de novo appeal of a finding and sentence should the court, after hearing, subsequently determine that a violation of one or more of the conditions of the continuance without a finding has occurred.

Continuance date:

_____
Defendant

_____
Defense Counsel

_____ _____ _____

Assistant District Attorney or Prosecuting Officer | Judge | Date

3:01 Procedure. CONTINUANCE OF A CRIMINAL CASE WITHOUT A FINDING MAY BE CONSIDERED AFTER A WAIVER OF A FIRST INSTANCE JURY TRIAL AND A PLEA OF NOT GUILTY, AND ONLY AFTER THE JUDGE FINDS AFTER HEARING THAT THERE ARE SUFFICIENT FACTS TO WARRANT A FINDING OF GUILTY.

A JUDGE MAY CONTINUE A CASE WITHOUT A FINDING EITHER AFTER AN ADMISSION OF SUFFICIENT FACTS BY THE DEFENDANT OR AFTER A TRIAL HAS BEEN HELD. DEPENDING ON WHICH OF THESE CIRCUMSTANCES PRECEDES THE CONTINUANCE WITHOUT A FINDING, DIFFERENT PROCEDURAL STEPS FOLLOW (SEE COMMENTARY).

THE FINDING OF SUFFICIENT FACTS TO WARRANT A FINDING OF GUILTY AFTER HEARING SHOULD BE ENTERED ON THE COMPLAINT AND ON THE SAMPLE FORM (SEE STANDARD 3:00). THERE SHOULD BE ATTACHED TO THE FORM A STIPULATION OF THE FACTS OF THE PARTIES, OR STATEMENT OF FACTS BY THE TRIAL JUDGE, OR A POLICE REPORT. THE SENTENCE RECOMMENDED TO BE IMPOSED IF THE CONDITIONS OF THE CONTINUANCE WITHOUT A FINDING ARE VIOLATED SHOULD BE ANNOUNCED BY THE JUDGE AND ENTERED ON THE FORM. THE FORM AND THE ATTACHMENTS SHOULD BE FILED WITH THE COMPLAINTS.

CASES ORDERED CONTINUED WITHOUT A FINDING SHOULD BE CONTINUED TO A SPECIFIC DATE.

COMMENTARY

A continuance without a finding may not be granted after a guilty plea or finding of guilty, but it may be granted after a finding of sufficient facts to warrant a finding of guilty, whether or not based on an admission of sufficient facts. The procedure of "admitting to sufficient facts" in a District Court bench trial is governed by Rule 12(a)(3) of the Mass. R. Crim. P. and is afforded recognition by the Supreme Judicial Court in Comm. v. Duquette, 386 Mass. 834, 438 N.E.2d 334 (1982). See also Comm. v. Ciummei, 378 Mass. 504, 392 N.E.2d 1186 (1979); Costarelli, petitioner, 378 Mass. 516, 392 N.E.2d 1193 (1979); and Comm. v. Connor, 14 Mass. App. Ct. 488, 440 N.E.2d 1181 (1982).

Of course, the defendant must file a written waiver of first instance jury trial prior to any type of hearing. The Judge should explain that the jury consists of six members of the community; that the defendant may participate in the jury's selection; that the jury decides the guilt or innocence of the defendant; that the verdict must be unanimous; and that the Judge instructs the jury on questions of law and imposes sentence if the defendant is found guilty by the jury.

The decision by a Judge to continue a case without a finding may be made after the defendant admits sufficient facts or after a trial has been held. Depending on which of these circumstances precedes the continuance of a case without a finding, different procedural steps listed below should be followed.

Where the Defendant Admits Sufficient Facts to Warrant a Finding of Guilty

1. The defendant may wish to enter an admission of sufficient facts to warrant a finding of guilty prior to the hearing.

2. If the Judge is advised that an admission to sufficient facts is to be made, the Judge should inquire as to whether there is an agreed recommendation. If the admission is made contingent upon the disposition of a continuance without a finding, it is recommended practice that the defendant be informed by the Judge that he or she does not intend to be restricted by the recommendation and may impose any sentence provided by law.

If the Judge does not make such announcement, the defendant has the right to withdraw the admission of sufficient facts either before or after hearing. If the admission is withdrawn prior to hearing, a trial should be held. If the admission is withdrawn after hearing and disposition, the defendant should receive a bench trial before another Judge, unless he or she agrees to trial before the same Judge. See Mass. R. Crim. P. 12(c)(2) which is made applicable to a continuance without a finding by Comm. v. Duquette, supra, and Standard 9:01.

3. The Judge should determine that the defendant has the capacity to enter an admission; that he or she is not under the influence of alcohol or drugs and is not suffering from any disability that prevents the defendant's understanding and making this decision; that the defendant understands the proceeding; that he or she has not been pressured or misled; and that the defendant has consulted with his or her attorney or, in any event, that the defendant realizes what he or she is admitting.

4. An abbreviated presentation of facts should be made and should contain all of the elements to warrant a finding of guilty beyond a reasonable doubt.

5. After hearing the recitation of facts, the Judge should announce for the record whether the evidence warrants a finding of guilty.

6. If the evidence warrants a finding of guilty, the Judge should then receive the report of the probation office and the recommendations of the Commonwealth and defense counsel, or the pro se defendant.

7. If, after hearing, the recommendation is that the complaint be continued without a finding and the Judge agrees with the recommendation, the defendant should be told that, by agreeing to a continuance without a finding, he or she is giving up certain constitutional rights. These rights include the right to a de novo jury trial if the defendant violates one or more of the conditions of the continuance without a finding; the rights to confront his or her accusers, to present evidence on his or her own behalf, and to cross-examine witnesses; and the right against self-incrimination. The defendant should be asked if he or she understands these rights and has any questions about them. See Comm. v. Duquette, supra; Comm. v. Ciummei, supra at 509-510; Costarelli, petitioner, supra; Comm. v. Connor, supra.

8. If the defendant assents to the continuance without a finding, the sample form, which includes a waiver of appeal, should be executed. See Standard 3:00. A stipulation of facts of the parties, findings of fact of the Judge, or a police report should be attached to the form and filed with the case papers.

9. If the Judge disagrees with the recommendation and has indicated pursuant to Mass. R. Crim. P. 12(c)(2) that he or she will not be bound by any recommendation, the Judge may sentence the defendant to the extent permitted by law, subject to defendant's appellate rights.

Where a Defendant Does Not Admit Sufficient Facts to Warrant a Finding of Guilty

1. After trial and a finding of sufficient facts to warrant a finding of guilty, the Judge may determine that a continuance without a finding of guilty is an appropriate disposition.

2. The Judge should inform the defendant that this disposition can be made only if the defendant agrees to the continuance without a finding and waives the right to a de novo jury trial in the event the conditions in the form are violated. The defendant should be asked if he or she understands the conditional nature of a continuance without a finding, and if he or she agrees to it. Comm. v. Duquette, supra.

3. If the defendant assents to the continuance without a finding, the form, which includes a waiver of appeal, should be executed. A stipulation of facts of the parties, findings of fact of the Judge, or a police report should be attached to the form and filed with the case papers.

General

1. Whenever a case is continued without a finding after a hearing, the entry on the complaint and on the docket should include the words "after hearing." District Court Administrative Regulation No. 5-72 (April 1, 1972).

2. To give finality to the use of a continuance without a finding in the primary court, the defendant, as a condition of obtaining a continuance without a finding, is required to waive

de novo appeal. Before the form is executed, the procedure established in Comm. v. Duquette, supra, should be followed.

3. When more than one complaint is continued without a finding, the complaint numbers should be inserted in the form, and this form should be filed with the complaint charging the most serious offense. Cross references to this complaint should be made on the other complaints that are continued without a finding. The original form should be filed with the complaint, with executed copies to the defendant, or defense counsel, the prosecution and the probation office.

4. The defendant should be advised by the Judge if a condition of the continuance without a finding includes probation supervision. Since the defendant has not been adjudicated guilty, the court may not impose conditions without obtaining the defendant's consent. Similarly, juveniles may be placed on probation supervision during the period of their continuance without a finding with their consent and that of one of their parents or guardians. G.L. c. 119, s. 58.

5. It is important to note that while a defendant whose case has been continued without a finding may be under supervision by the probation office, he or she is not formally on probation.

6. As a condition of a continuance without a finding, the Judge may order restitution and assess reasonable costs and expenses. See G.L. c. 280, s. 6, and Standard 9:03.

7. A continuance without a finding is not appealable by the defendant under G.L. c. 278, s. 18, as it is not a "finding" or a "sentence." A defendant may refuse to accept the court's disposition of a continuance without a finding and may insist on a finding. See Marks v. Wentworth, 199 Mass. 44, 85 N.E. 81 (1908), where the Court held that a defendant may object to the placement of the case on file and may insist on a disposition of the matter.

3:02 Recording of Sentence to be Imposed If Conditions are Violated. UPON THE CONTINUANCE OF A CASE WITHOUT A FINDING, IT IS STATED ON THE FORM AND SHOULD BE STATED ON THE COMPLAINT THAT THE JUDGE HAS FOUND FACTS SUFFICIENT TO WARRANT A FINDING OF GUILTY. THE DEFENDANT SHOULD BE INFORMED OF THE SENTENCE WHICH IS INSERTED IN THE FORM. THE DEFENDANT ALSO SHOULD BE INFORMED THAT IF HE OR SHE VIOLATES ONE OR MORE OF THE CONDITIONS OF THE CONTINUANCE, THE CASE WILL BE BROUGHT FORWARD, THE GUILTY FINDING ENTERED, AND, IN THE ORDINARY COURSE, THE SENTENCE WHICH HAS BEEN INSERTED EXECUTED. SINCE THE WAIVER OF TRIAL DE NOVO HAS BEEN AGREED TO BY THE DEFENDANT ON THE FORM, THE DEFENDANT SHOULD UNDERSTAND THAT THE SENTENCE IS FINAL.

COMMENTARY

The sample form should be used to effectuate a continuance without a finding. See Standard 3:00. A police report, or stipulation of facts of the parties, or findings of fact of the trial Judge should be attached to the form.

3:03 Procedure Upon Alleged Violation of Conditions of Continuance Without a Finding. WHEN A DEFENDANT IS ALLEGED TO HAVE VIOLATED ONE OR MORE OF THE CONDITIONS OF A CONTINUANCE WITHOUT A FINDING, THE CASE SHOULD BE BROUGHT FORWARD, THE DEFENDANT SUMMONED AND A HEARING HELD TO DETERMINE WHETHER A VIOLATION HAS OCCURRED.

SINCE ONE IS NOT USUALLY PLACED ON FORMAL PROBATION IN CONJUNCTION WITH A CONTINUANCE WITHOUT A FINDING, THE HEARING ON WHETHER A VIOLATION OCCURRED USUALLY IS NOT A PROBATION REVOCATION HEARING AND DOES NOT NECESSITATE STRICT ADHERANCE TO THE PROCEDURAL REQUIREMENTS OF A SURRENDER HEARING. HOWEVER, WHERE LOSS OF LIBERTY IS IN QUESTION, APPROPRIATE DUE PROCESS STEPS OF NOTICE, COUNSEL AND HEARING SHOULD BE OBSERVED.

IF A VIOLATION OF ONE OR MORE OF THE CONDITIONS OF THE CONTINUANCE WITHOUT A FINDING IS FOUND, AND THE PROVISIONS OF STANDARDS 3:01 and 3:02 HAVE BEEN COMPLIED WITH, THE JUDGE THEN SITTING SHOULD ENTER THE GUILTY FINDING AND PLACE INTO EFFECT THE RECOMMENDED SENTENCE, REGARDLESS OF WHETHER OR NOT HE OR SHE PRESIDED OVER THE ORIGINAL HEARING OR TRIAL.

COMMENTARY

The determination of whether a defendant has violated one or more of the conditions of a continuance without a finding

need not include the formal elements of a probation revocation hearing, although the defendant is entitled to be represented by counsel and present evidence on the issue of violation of the conditions.

Upon notice of an alleged violation of one or more of the conditions of the continuance, a hearing should be scheduled before the original trial Judge whenever possible. In the event that the original trial Judge is unavailable, the hearing should be conducted before the Judge then presiding. Upon making an affirmative determination that one or more of the conditions set forth in the form have been violated, that Judge should enter a finding of guilty and, in the ordinary case, impose the recommended sentence previously agreed to by the defendant. Prior to entry of a finding of guilty, the Judge should afford an opportunity to the defendant to present evidence in rebuttal to the alleged violation of the conditions of the continuance. See District Court Bulletin No. 2-81, Item 29 (May 28, 1981).

3:04 Ultimate Dismissal; Conditions of Continuance Without a Finding Not Violated. IN EVERY CASE CONTINUED WITHOUT A FINDING, THE DEFENDANT SHOULD BE REQUIRED TO APPEAR BEFORE THE COURT ON THE DATE TO WHICH THE CASE HAS BEEN CONTINUED, UNLESS GEOGRAPHICAL DISTANCE OR OTHER SPECIAL CIRCUMSTANCES WOULD MAKE SUCH A REQUIREMENT UNDULY BURDENSOME. COMPLIANCE WITH THE CONDITIONS OF THE CONTINUANCE WITHOUT A FINDING DURING THE TERM OF THE CONTINUANCE SHOULD RESULT IN DISMISSAL OF THE CASE.

COMMENTARY

Unless special circumstances prevent it, a defendant should be required to return to court on the date to which a case has been continued in order to formally conclude the case. Additionally, a defendant who intends to file a motion to have his or her record sealed by a Judge pursuant to G.L. c. 276, s. 100C, should be required to return to court. See Standard 9:06 on sealing of records.

Generally, the case will be dismissed on the continuance date. In those instances in which the record reflects that a hearing on the merits had been conducted prior to the entry of a continuance without a finding, the Judge then sitting may dismiss the matter on the continuance date even if the Commonwealth objects to the dismissal. See District Court Administrative Regulation No. 5-72 (April 1, 1972). If a hearing on the merits had not been held prior to the entry of a continuance without a finding and the Commonwealth does not consent to the dismissal of the case on the continuance date, Comm. v. Brandano, 359 Mass. 332, 337, 269 N.E.2d 84, 88 (1971), dictates the procedure to be followed:

> When dismissal of a case is proposed by the defendant or by the judge without the consent

> of the Commonwealth, the defendant shall file an affidavit in support of a dismissal which shall contain all of the facts and the law relied upon in justification of a dismissal. The Commonwealth may file a counter affidavit, and, as to matters contained in the affidavits which are in dispute, there shall be a hearing unless the judge concludes that on the face of the affidavits 'the interests of public justice' do not warrant a dismissal. If the judge concludes that the 'interests of public justice' require a dismissal he shall record the findings of fact and the reasons for his decision. The Commonwealth would have a right of appeal under G.L. c. 278, s. 28E, as amended.

In Comm. v. Eaton, 11 Mass. App. Ct. 732, 419 N.E.2d 849 (1981), the Judge began to conduct a hearing on the merits which was not concluded prior to the entry of a continuance without a finding. The defendant had no opportunity to be heard. As a result, the Appeals Court held that a second hearing did not place the defendant in jeopardy.

PROBATION

4:00 General
4:01 Pretrial Probation
4:02 "Straight Probation"
4:03 Conditions of Probation
4:04 Probation Revocation

4:00 General. PROBATION SHOULD BE VIEWED AS AN AFFIRMATIVE DISPOSITION TO BE CONSIDERED WHEN THE COURT DETERMINES THAT SUPERVISION FOR A FIXED PERIOD IS IN THE BEST INTERESTS OF BOTH THE DEFENDANT AND THE PUBLIC. THE FOCUS OF PROBATION IS ON IMPROVING THE FUTURE BEHAVIOR OF THE DEFENDANT.

COMMENTARY

Probation is a formal legal relationship between a defendant and the court through the probation office. Unless prohibited by the statute defining the offense with which the defendant is charged, it is available under three circumstances: (1) pretrial diversion, G.L. c. 276A, ss. 1-9; (2) before trial, if defendant consents, G.L. c. 276, ss. 42A and 87; and (3) after a finding of guilty, G.L. c. 276, s. 87. For further information concerning pretrial probation, see Standard 4:01.

A distinction between probation and a continuance without a finding should be noted. Probation connotes supervision unless the contrary is stated by the Judge. If probation is to be without supervision, that should be announced by the Judge from the bench and noted on the record. In contrast, a continuance without a finding does not ordinarily include supervision unless the court specifically requests it. Additionally, supervision imposed in conjunction with a continuance without a finding is not considered "formal probation," whereas supervision imposed after a guilty finding is regarded as "formal probation." It is noteworthy that for purposes of G.L. c. 90, s. 24D, a defendant may be placed on probation with his or her consent in conjunction with a continuance without a finding and assignment to a drug or alcohol rehabilitation program.

Supervision may be imposed with a continuance without a finding upon determination by the Judge after trial or an admission of sufficient facts that the evidence warrants a finding of guilty, and pursuant to an agreement among the defendant, defense counsel, the prosecution and the court.

4:00 General. PROBATION SHOULD BE VIEWED AS AN AFFIRMATIVE DISPOSITION TO BE CONSIDERED WHEN THE COURT DETERMINES THAT SUPERVISION FOR A FIXED PERIOD IS IN THE BEST INTERESTS OF BOTH THE DEFENDANT AND THE PUBLIC. THE FOCUS OF PROBATION IS ON IMPROVING THE FUTURE BEHAVIOR OF THE DEFENDANT.

COMMENTARY

Probation is a formal legal relationship between a defendant and the court through the probation office. Unless prohibited by the statute defining the offense with which the defendant is charged, it is available under three circumstances: (1) pretrial diversion, G.L. c. 276A, ss. 1-9; (2) before trial, if defendant consents, G.L. c. 276, ss. 42A and 87; and (3) after a finding of guilty, G.L. c. 276, s. 87. For further information concerning pretrial probation, see Standard 4:01.

A distinction between probation and a continuance without a finding should be noted. Probation connotes supervision unless the contrary is stated by the Judge. If probation is to be without supervision, that should be announced by the Judge from the bench and noted on the record. In contrast, a continuance without a finding does not ordinarily include supervision unless the court specifically requests it. Additionally, supervision imposed in conjunction with a continuance without a finding is not considered "formal probation," whereas supervision imposed after a guilty finding is regarded as "formal probation." It is noteworthy that for purposes of G.L. c. 90, s. 24D, a defendant may be placed on probation with his or her consent in conjunction with a continuance without a finding and assignment to a drug or alcohol rehabilitation program.

Supervision may be imposed with a continuance without a finding upon determination by the Judge after trial or an admission of sufficient facts that the evidence warrants a finding of guilty, and pursuant to an agreement among the defendant, defense counsel, the prosecution and the court.

When available and appropriate, probation should be used to promote the goal of law-abiding behavior. The court should indicate the level of supervision required in each case. For a discussion of probation imposed in conjunction with a fine, refer to G.L. c. 279, ss. 1 and 1A and Standard 5:00.

Probation is a sentence, McHoul v. Comm., 365 Mass. 465, 312 N.E.2d 539 (1974), which must be appealed, if at all, at the time it is imposed. Probation must be imposed for a definite time period, Finer v. Comm., 250 Mass. 493, 146 N.E. 123 (1925). In non-support cases, probation may not exceed six years, except where defaults have been recorded. G.L. c. 273, s. 5. Probation, however, may be extended when, in the opinion of the Judge, the circumstances so warrant it (i.e. the defendant has not complied with a condition of probation, such as payment of a fine, restitution, etc.). Extension of probation should be distinguished from revocation of probation. See Standard 4:04. Comm. v. Sawicki, 369 Mass. 377, 339 N.E.2d 740 (1975); Comm. v. Ward, 15 Mass. App. Ct. 388, 445 N.E.2d 1094 (1983).

Termination of probation is not automatic when the stated period of probation has run, even when no steps leading to the revocation of probation have been undertaken previously by the court. A court order terminating probation is required, and this may occur after the close of the probation period originally set. See Comm. v. Sawicki, supra, and Comm. v. Ward, supra. The defendant should be present in court for the termination of probation unless the Judge orders otherwise.

Upon successful completion of the period of probation, the record should reflect the following: "Probation terminated, defendant discharged." District Court Administrative Regulation No. 4-73 (January 1, 1974). An entry of "dismissed" should not be made.

4:01 Pretrial Probation. PROBATION MAY BE USED IN SPECIAL CIRCUMSTANCES BEFORE TRIAL.

COMMENTARY

General Laws c. 276, s. 87 provides as follows:

> [A]ny district court . . . may place on probation in the care of its probation officer any person before it charged with an offense or a crime for such time and upon such conditions as it deems proper with the defendant's consent, before trial and before a plea of guilty . . . .

Unless prohibited by statute, pretrial probation may be ordered by the court either with or without supervision by the probation office. The defendant may be required to refrain from certain conduct or activities for a certain period of time.

Pretrial probation is a particularly effective device in neighborhood cases, cases of domestic violence and emergency situations. General Laws c. 276, s. 42A provides:

> Whenever a court issues a criminal complaint and the crime involves assault and battery, trespass, threat to commit a crime, nonsupport, or any other complaint which involves the infliction, or the imminent threat of infliction, of physical harm upon a person by such person's family or household member as defined in section one of chapter two hundred and nine A, the court may, in lieu of or in addition to any terms of personal recognizance, and after a hearing and finding, impose such terms as will insure the safety of the person allegedly suffering the physical abuse or threat thereof, and will prevent its recurrence.

> Such terms and conditions shall include reasonable restrictions on the travel, association or place of abode of the defendant as will prevent such person from contact with the person abused.

For the civil counterpart of this statute, see G.L. c. 209A.

After hearing or trial, the Judge will either dismiss the matter or enter an appropriate disposition. Upon a violation of one or more of the conditions of pretrial probation, the defendant may be brought into court on a "Notice of Violation of Probation" or a warrant. Upon a charge of a subsequent offense, the defendant may be brought into court on a summons in accordance with G.L. c. 276, s. 24 or, in appropriate circumstances, on a warrant, in accordance with G.L. c. 279, s. 3, which provides as follows:

> At any time before final disposition of the case of a person placed under probation supervision or in the custody or care of a probation officer, the probation officer may arrest him without a warrant and take him before the court, or the court may issue a warrant for his arrest. When taken before the court, it may, if he has not been sentenced, sentence him or make any other lawful disposition of the case . . . .

Sealing of a defendant's record, which includes an order of pretrial probation, is governed by G.L. c. 276, ss. 100A-100C. See Standard 9:04 for a detailed discussion of these statutes. See also G.L. c. 276A regarding pretrial diversion.

4:02 "Straight Probation." AFTER A FINDING OF GUILTY, THE COURT MAY IMPOSE PROBATION ALONE ("STRAIGHT PROBATION," SO CALLED). UPON A VIOLATION OF PROBATION IN A CASE WHERE STRAIGHT PROBATION IS IMPOSED, THE JUDGE MAY IMPOSE A FULL RANGE OF PENALTIES UNDER THE STATUTE, WITHOUT RIGHT OF DE NOVO APPEAL. THE COURT SHOULD SO INFORM AN UNREPRESENTED DEFENDANT.

COMMENTARY

Straight probation is a privilege reserved for the appropriate defendant. A sentence of probation, whether or not accompanied by a suspended sentence, has finality in the sense that an appeal may be taken from the imposition of probation. McHoul v. Comm., 365 Mass. 465, 312 N.E.2d 539 (1974). A defendant who is found guilty and sentenced to probation must claim a de novo appeal of that sentence at the time it is made. G.L. c. 278, s. 18; Rule 7 of the Dist. Ct. Supp. R. Crim. P. A defendant who does not claim an appeal of the sentence at that time loses the right to appeal it. Younker v. District Court of Natick, 374 Mass. 31, 370 N.E.2d 1371 (1977). Should he or she violate the conditions of probation, the defendant is subject to any sentence within the limits of the law, without right of appeal to the jury of six. Younker, supra.

Probation is a mandatory disposition for certain drug related offenses. A person who is convicted for the first time under G.L. c. 94C, s. 34 for the possession of marijuana or a Class E controlled substance, and has not previously been convicted of any other drug related offense,

> shall be placed on probation unless such person does not consent thereto, or unless the court files a written memorandum stating the reasons for not so doing. Upon successful completion of said probation, the case shall be dismissed and records shall be sealed.

(Emphasis added.) The written memorandum should be filed by

the Judge and placed with the case papers when probation is not imposed.

Judges should be mindful that "straight probation" can be viewed as a relatively severe penalty upon a defendant because, upon a violation of the probationary terms, the full range of statutory penalties may be imposed and the defendant will be without a right of de novo appeal at that time.

4:03 Conditions of Probation. SPECIAL CONDITIONS OF PROBATION MUST BE ESTABLISHED BY THE JUDGE. PROBATION OFFICERS ARE NOT AUTHORIZED TO SET SPECIAL PROBATION CONDITIONS OR TO BE DELEGATED SUCH AUTHORITY BY THE COURT. THEY SHOULD CONSULT WITH THE SENTENCING JUDGE IF CLARIFICATION OF THE JUDGE'S CONDITIONS IS NEEDED.

GENERAL AND SPECIAL CONDITIONS OF PROBATION MUST BE GIVEN TO THE DEFENDANT IN WRITING. THE DEFENDANT MUST BE NOTIFIED BY THE PROBATION OFFICE OF THE POSSIBLE CONSEQUENCES OF ANY VIOLATION OF THE CONDITIONS OF PROBATION.

IF THE COURT HAS INSTRUCTED THE PROBATION OFFICER TO DETERMINE THE EXACT AMOUNT OF RESTITUTION, THE JUDGE SHOULD ADVISE THE PARTIES THAT THEY WILL BE HEARD BY THE JUDGE IF RESTITUTION CANNOT BE AGREED TO.

COMMENTARY

Probation conditions should be tailored, where possible, to correct the behavior at issue in each case in which probation is imposed.

The Judge should not allow the probation office to set special terms of probation. Questions such as how much is to be paid for restitution must be decided by the Judge, or be subject to his or her specific approval. See United States v. Shelby, 573 F.2d 971, 976 (7th Cir. 1978), and People v. Gallagher, 55 Mich. App. 613, 223 N.W.2d 92 (1974). When the amount of restitution cannot be ascertained at trial, the Judge may delegate this responsibility to the probation office subject to the specific approval or review of the court.

Details such as the schedule for paying fines or restitution, may be left to the probation office; but if a defendant objects to any such details, he or she should be permitted review by the court. Standard 9:04 discusses the subject of restitution.

The standard forms containing "Conditions of Probation" and "Special Conditions of Probation" (used when a defendant is on "formal" probation) and "Terms of Supervision" and "Special Terms of Supervision" (used when a defendant is on "informal" probation or "probation supervision") follow.

COMMONWEALTH OF MASSACHUSETTS

THE TRIAL COURT

Department_____ _____ 19___
Date

Division_____

To_____

You have been placed on probation to _____.

You have been placed on probation to _____, with a suspended sentence of _____.

Unless otherwise excused, you are required to return to court on _____ when a report on your probation progress will be made.

If you fail to comply with any of the following conditions of probation, now placed on you by this court, you may be ordered to appear again in court, after due notice, and the court may change the conditions, extend the period of probation or impose sentence. If you should fail to appear you may be defaulted and a warrant for your arrest may be issued.

CONDITIONS OF PROBATION
(Strike out conditions not imposed by the Court)

1. You must obey local, state or federal laws or court order.
2. You must report to your assigned probation officer at such time and place as he/she requires.
3. You must notify the probation officer immediately of a change of residence or employment.
4. You must not leave the Commonwealth without the express permission of the probation officer. Such permission may be conditioned upon your agreement to waive extradition.

SPECIAL CONDITIONS OF PROBATION

5. _____

_____

6. _____

_____

7. _____

_____

I have read and understand the above conditions of probation and agree to observe them. I acknowledge receipt of a copy of these conditions.

_____ _____
Probationer

_____ _____
Witness (Probation Officer) Make checks payable to

___ Signed original to Probationer. _____

___ Signed duplicate in folder. _____

FORM OCP-6A 2OOM-6/81-163844

COMMONWEALTH OF MASACHUSETTS

THE TRIAL COURT

Department _____ _____ 19____
Date

Division _____

To _____

You have been placed under probation officer supervision to:_____.

Unless otherwise excused, you are required to return to court on _____ _____ when a report on your progress will be made.

If you fail to comply with any of the following terms of supervision now placed on you by this court, you may be ordered to appear again in court, after due notice, and the court may change the terms, extend the period of supervision or enter an alternate disposition. If you should fail to appear, you may be defaulted and a warrant for your arrest may be issued.

TERMS OF SUPERVISION

(Strike out terms not imposed by the Court)

1. You must obey all court orders and local, state and federal laws.
2. You must report to your assigned probation officer at such time and place as he/she requires.
3. You must notify the probation officer immediately of a change of residence or employment.
4. You must not leave the Commonwealth without the express permission of the probation officer. Such permission may be conditioned upon your agreement to waive extradition.

SPECIAL TERMS OF SUPERVISION

5. _____

_____

6. _____

_____

7. _____

_____

I have read and understand the above terms of supervision and agree to observe them. I acknowedge receipt of a copy of these terms of supervision.

_____ _____
Offender

_____ Make checks payable to
Witness (Probation Officer)

_____

____ Signed original to Offender

_____

____ Signed duplicate in folder.

4:04 Probation Revocation. WHEN SURRENDERED FOR AN ALLEGED VIOLATION OF A CONDITION OF PROBATION OR UPON A SUBSEQUENT CRIMINAL COMPLAINT, A PROBATIONER SHOULD RECEIVE AT LEAST SEVEN DAYS NOTICE OF A PROBATION REVOCATION HEARING. THE PROBATIONER ALSO IS ENTITLED TO COUNSEL IN ANY HEARING ON AN ALLEGED VIOLATION OF PROBATION.

IF A PROBATIONER IS HELD IN CUSTODY AS A RESULT OF THE CHARGE OF VIOLATION OF PROBATION, HE OR SHE IS ENTITLED TO A PRELIMINARY PROBATION REVOCATION HEARING AND A FINAL PROBATION REVOCATION HEARING. OTHERWISE, A PROBATIONER IS ENTITLED ONLY TO A FINAL PROBATION REVOCATION HEARING.

THE PROBATIONER MAY WAIVE RIGHTS TO NOTICE, COUNSEL OR A PRELIMINARY HEARING.

UPON A FINDING OF A VIOLATION OF ANY OF THE GENERAL OR SPECIAL CONDITIONS OF PROBATION, A DEFENDANT'S PROBATION MAY BE REVOKED. IF A DEFENDANT HAS BEEN PLACED ON STRAIGHT PROBATION, UPON REVOCATION OF PROBATION THE DEFENDANT MAY BE SENTENCED IN ACCORDANCE WITH THE STATUTE DEFINING THE OFFENSE FOR WHICH PROBATION WAS ORIGINALLY IMPOSED WITHOUT RIGHT OF FURTHER APPEAL TO THE JURY OF SIX.

IF A DEFENDANT HAS BEEN PLACED ON PROBATION IN CONJUNCTION WITH A SUSPENDED SENTENCE, UPON REVOCATION OF THAT PROBATION THE ENTIRE SENTENCE ORIGINALLY SUSPENDED MUST BE IMPOSED. SEE STANDARD 6:01.

COMMENTARY

Preliminary Probation Revocation Hearings

A preliminary probation revocation hearing is required only when a defendant is held in custody as a result of the charge of violation of probation. Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756 (1973); Fay v. Comm., 379 Mass. 498, 399 N.E.2d 11 (1980); District Court Administrative Bulletin No. 1-80, Item 12 (March 27, 1980).

This hearing may be conducted by a Judge or by a Clerk-Magistrate for the purpose of determining whether there is probable cause to believe a probationer has violated the terms of his or her probation. The minimum quantum of evidence necessary for a finding that there is probable cause to believe a probationer has violated the terms of probation is "sworn testimony setting forth facts substantiating such allegations." See Rule 6 of the Uniform Magistrate Rules of the Trial Court on preliminary probation revocation hearings which appears following this standard. The probationer is entitled to counsel and a hearing at which he or she may be confronted by the accuser, cross-examine witnesses, and introduce testimony and other documentary evidence disputing the charge of violation of probation. Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593 (1972). The rules of evidence are inapplicable.

When there is a dispute about a subsequent criminal conviction or finding of probable cause which was entered against the probationer, "a certified copy of such conviction or probable cause finding or the original of the record thereof shall be requested from the prosecuting probation officer by the magistrate. However, the submission of such records or copies shall not be indispensable to a finding of probable cause." Uniform Magistrate Rule 6.

If there is a finding of probable cause at the preliminary probation revocation hearing, a Judge or Clerk-Magistrate may set the terms of the probationer's release pending a subsequent hearing on the issue of revocation and imposition of additional sanctions. If bail is set by a Clerk-Magistrate, and the probationer is held in custody, he or she may appeal the question of bail to a Judge in the District Court at which the hearing has been held. Uniform Magistrate Rule 6 does not provide for a right of appeal of the bail decision to the Superior Court.

Final Probation Revocation Hearings

Rubera v. Comm., 371 Mass. 177, 180-181, 355 N.E.2d 800, 803-804 (1978), establishes the following three principles governing final probation revocation hearings:

> Any conduct by a person on probation which constitutes a violation of any of the conditions of his probation may form the basis for the revocation of that probation. Such conduct may involve the violation of criminal laws, but there is no prerequisite that the probationer be convicted thereof to permit the violation to be used as the basis for the revocation . . . .
>
> If the act alleged to be a violation of probation is made the subject of a criminal complaint, the commencement of the criminal prosecution does not preclude the revocation of the earlier probation nor does it require that the revocation proceedings be deferred until the comple-tion of the new criminal proceeding . . . .
>
> Further, if the act relied on as a violation of an earlier probation results in a criminal conviction, the fact that the conviction is awaiting appellate review does not prevent it from forming the basis for the revocation of probation . . . .

A final probation revocation hearing must be conducted by a Judge. At a final probation revocation hearing, all testimony is under oath, the rules of evidence do not apply, and the probationer is entitled to counsel and to cross-examine witnesses and introduce other testimony to support the denial of the alleged violation.

The standard of proof at a final probation revocation hearing is not provided for by statute or by Massachusetts decision. The Supreme Judicial Court has not established a standard of proof but other jurisdictions have adopted the "fair preponderance of the evidence" standard, apparently based on the fact that probation revocation is in the nature of a civil proceeding. See, e.g. Ross v. State, 313 So. 2d 756, 760, cert. den. 423 U.S. 924 (Fla. 1975); People v. Grayson, 58 Ill.2d 260, 319 N.E.2d 43, 45, cert. den. 421 U.S. 994

(1974); State v. Sommer, 388 A.2d 110, 112 (Me. 1978); People v. Miller, 77 Mich. App. 381, 258 N.W.2d 235 (1977); State v. Mingua, 42 Ohio App. 2d 35, 71 Ohio Ops. 234, 327 N.E.2d 791 (1974); and Comm. v. Brown, 281 Pa. Super. 348, 422 A.2d 203 (Pa. Super. 1980).

A motion to revise or revoke a sentence filed more than sixty days after its imposition cannot be entertained at a probation revocation hearing. See Standard 8:01.

Probation may not be revoked arbitrarily. McHoul v. Comm., 365 Mass. 465, 312 N.E.2d 539 (1974). A Judge may not automatically revoke a defendant's probation for failure to pay a fine or comply with an order of restitution that was imposed as a condition of probation, but must first determine "that the probationer has not made sufficient bona fide efforts to pay or that adequate alternative forms of punishment did not exist." Bearden v. Georgia, 103 S.Ct. 2064 (1983). Upon revocation of probation, a defendant is subject to any sentence within the limits of the law without right of appeal to the jury of six. Younker v. District Court of Natick, 374 Mass. 31, 370 N.E.2d 1371 (1977).

Revocation of probation should be distinguished from extension of probation. See Standard 4:00. On the effect of revocation of probation imposed in conjunction with a suspended sentence, see Standard 6:01.

Following Uniform Magistrate Rule 6 are standards and forms from the Office of the Commissioner of Probation for use by the court in conducting probation revocation proceedings.

Rule 6
PRELIMINARY PROBATION REVOCATION HEARINGS
(District Court, Boston Municipal Court and Superior Court Departments)

(a) *Applicability of Rule.* This rule governs procedures for the scheduling and conduct of preliminary hearings held before magistrates for the purpose of determining whether there is probable cause to believe a probationer has violated the terms of his probation in the District Court, Boston Municipal Court and Superior Court Departments. Such preliminary hearings are required by law to be conducted as a prerequisite to holding the probationer in custody pending the full probation revocation hearing and only when the basis for such custody, if any, will be the charge of probation violation.

(b)(1) *Surrender on Warrant.* If a probationer is surrendered by means of a warrant, no preliminary hearing shall be held until the probationer is given written notice of the factual allegations on which the surrender was based. Upon such surrender a justice or magistrate shall set the date and time of such hearing and shall decide the terms of release pending such hearing, which may include modification of the pending recognizance.

(2) *Voluntary Surrender.* If a probationer surrenders in response to a written notice of surrender, no preliminary hearing shall be held until the magistrate is satisfied that the written notice fully describes the factual allegations on which the surrender was based and that the probationer is aware of these allegations. Such written notice of probation surrender shall be on the form provided by the Commissioner of Probation or such other form as may be promulgated by the Chief Administrative Justice of the Trial Court. Such form shall be completed and sent by the probation officer wishing to effect the surrender, provided that said probation officer consults with the magistrate regarding the date and time of hearing that are to appear on such notice and the decision on whether a preliminary hearing will be necessary.

(c) *Counsel.* If a preliminary probation revocation hearing is held, the probationer shall have the right to be assisted by counsel. The magistrate conducting such a hearing may appoint counsel to represent an indigent probationer if in his opinion such appointment is necessary in the interests of justice. Said appointment shall be in accordance with Rule 8 of the Massachusetts Rules of Criminal Procedure and other applicable rules of court.

(d) *Procedure.* Preliminary probation revocation hearings shall be conducted in courtrooms whenever feasible. If not feasible, such hearings shall take place in any other room in the courthouse in which the public has access. Only when no courtroom or public room is available shall a magistrate's office or any other room to which the public generally has limited access be used for such hearings. In those instances when a magistrate's office or other private room must be used in accordance with this rule, the magistrate shall explain to the probationer and his counsel, if any, the reason for the use of such room.

Such hearings shall be stenographically or electronically recorded unless neither a stenographer nor electronic recording equipment is available.

All witnesses at such hearings shall be placed under oath.

The probationer or, if he is represented by counsel, his counsel, shall be allowed to question any witnesses he may present and shall be allowed to cross-examine witnesses testifying against him.

The rules of evidence shall not apply at such hearings. All evidence shall be given such weight as deemed appropriate by the magistrate.

The minimum quantum of evidence necessary for a finding that there is probable cause to believe a probationer has violated the terms of his probation shall be sworn testimony setting forth facts substantiating such allegations. If such testimony of itself is satisfactory to the magistrate to establish that the allegations are probably correct, and if this probability is not overcome by testimony by the probationer or his witnesses or by documentary evidence submitted by the probationer, then probable cause may be found by the magistrate. In cases when the surrender is based on an allegation that there has been a criminal conviction or finding of probable cause entered against the probationer subsequent to the probation order of which revocation is sought, and there is a dispute on the validity of this allegation, a certified copy of such conviction or probable cause finding or the original of the record thereof shall be requested from the prosecuting probation officer by the magistrate. However, the submission of such records or copies shall not be indispensable to a finding of probable cause.

When available, a court officer shall be present at such hearings.

(e) *Summary of Proceedings.* The magistrate shall, upon the completion of such hearing, prepare a written memorandum summarizing the proceedings and stating the reasons for the finding made. Such summary and statement of reasons shall be made on the form provided for this purpose by the Commissioner of Probation or such other form as may be promulgated by the Chief Administrative Justice of the Trial Court. When completed, one copy of such form shall be placed with the case papers, one copy shall be given to the probation officer and one copy shall be given to the probationer.

(f) *Bail.* If after a preliminary probation revocation hearing has been held the magistrate finds probable cause, and the probationer is not being held on any other basis, the magistrate may amend the terms of release then pending against the probationer by the imposition of or increase in the amount of monetary bail and by commitment for failure to satisfy such bail requirements.

When a defendant is held in custody after a preliminary hearing pending a final probation revocation hearing, the defendant may appeal the terms of bail under which he is being held to a judge in the Department, and in the case of the District Court Department, a judge in the same division in which the hearing has been held, as soon as may be, and not later than the next court day following the preliminary hearing.

JOSEPH P. FOLEY
COMMISSIONER

The Commonwealth of Massachusetts
Office of Commissioner of Probation
211 New Court House, Boston 02108

STANDARD AND FORMS REGARDING SURRENDER AND REVOCATION OF PROBATION FOR THE PROBATION OFFICES OF THE SUPERIOR COURT DEPARTMENT DISTRICT COURT DEPARTMENT BOSTON MUNICIPAL COURT DEPARTMENT AND THE JUVENILE COURT DEPARTMENT

Pursuant to General Laws, Chapter 276, Section 99, as amended, the following standard, together with revised form(s), approved by the Chief Administrative Justice of the Trial Court, is hereby established and promulgated by the Commissioner of Probation.

May 4, 1981

(s) Joseph P. Foley
Joseph P. Foley
Commissioner of Probation

I Notice. The probationer shall be entitled to at least 7 days notice on the form attached hereto, and this shall apply to a probationer who is brought before the Court on a warrant unless he/she has previously received said notice.

II Counsel. The probationer shall be entitled to counsel in any hearing on alleged violation(s) of probation.

2500-6-81-163858

III Hearings:

A If a probationer is surrendered and held in custody on a charge of violation of probation, apart from any other criminal/delinquency charge, he/she shall be entitled to (1) a preliminary hearing to determine probable cause on the alleged violation and (2) a separate final revocation hearing.

B If a probationer is held in custody on a criminal/delinquency charge other than violation of probation, and a charge of such violation is then preferred against him/her, then, after (1) a guilty/delinquent finding, or (2) a finding of probable cause, or (3) his/her being bound over to the Superior Court, with respect to another criminal charge, he/she shall not be entitled to a preliminary probable cause hearing on the alleged probation violation, but he/she shall be entitled to a final revocation hearing, after due notice therof.

See Gagnon v. Scarpelli, 93 S. Ct. 1756 (1973)
U.S. v. Strada, 503 F.2nd 1081 (8th Cir. 1974)
U.S. v. Sciuto, 531 F.2nd 842 (7th Cir. 1976)

IV Waiver. The probationer may waive his/her rights to notice, counsel or preliminary hearings by executing a waiver on the appropriate form attached hereto.

V Conduct of hearings:

A Except as may be otherwise provided by Court rule or administrative order both the preliminary hearing and the final revocation hearing shall be conducted by a judge.

B If the alleged violation is a subsequent criminal/delinquency complaint against the probationer in the same Court, the preliminary hearing (and the final revocation hearing if the preliminary hearing is waived), pursuant to the requisite notice may take place immediately following the hearing on the subsequent criminal/delinquency complaint. In this event the evidence admitted at the hearing on said complaint may be considered by the judge in his/her determination or finding on the probation revocation proceeding, provided the probationer shall have a full opportunity to introduce additional relevant evidence.

C If probable cause of violation of probation is determined and a separate final revocation hearing is held, the same judge may not sit on the final hearing unless the probationer expressly agrees thereto.

D The standard of proof in a final revocation hearing shall be a preponderance of the evidence.

E All testimony in both preliminary and final hearings, including that given by probation officers, shall be under oath.

F The rules of evidence shall not apply to testimony and documents offered on the issue of disposition nor on the issue of the alleged violation(s).

G When there is a subsequent criminal/delinquency complaint against the probationer, the record of a guilty finding thereon in the same court or a certified copy thereof from another court shall be admissible in any probation revocation hearing, preliminary or final. The fact that the conviction is appealed for a trial de novo or is awaiting appellate review does not prevent it from forming the basis for the revocation of probation.*

H At the conclusion of the preliminary and final hearing, findings and orders on the forms attached hereto shall be completed and filed with the case papers and copies provided to the probation department.

VI Extension of Probation. If at the termination of the period of probation the probation officer intends to recommend an extension of probation, he/she shall give written notice thereof to the probationer informing him/her of his/her right to be represented by counsel at the Court hearing upon said expiration date and informing him/her of the factual basis for the recommendation of any extension. If the probationer consents thereto, probation may be extended; if the probationer does not consent, the rules and regulations relative to probation revocation proceedings shall apply.

VII Juvenile Cases. These guidelines shall apply to all probationers adjudicated as delinquent or as children in need of services.

* It is the duty of a probation officer, when one of his/her probationers has been brought before a district court for a subsequent offense, has been found guilty/delinquent, and demanded a trial de novo, or has been bound over to the superior court following a probable cause hearing, to investigate the circumstances, and if in his/her opinion the probationer has violated the conditions of his/her probation, to surrender him/her for the court's decision without awaiting final disposition on the new charge.

Probation Office

Court

Address

COMMONWEALTH vs

Street

Ma.

NOTICE OF SURRENDER AND HEARING(S) FOR ALLEGED VIOLATION(S) OF PROBTION

You are hereby notified to appear in this Court at ___a.m./p.m. on _____ 19___ for a hearing on a charge that you have violated the terms and conditions of your probation imposed by this Court on _____, 19___ on the following complaints (Docket Number(s) and Brief Description):

_____

_____

(Strike out (1) or (2) below, whichever is inapplicable).

(1) This hearing will be to determine whether there is probable cause to believe you have committed a violation of your probation. If the Court so finds, there will be a subsequent hearing on the issue of revocation and imposition of additional sanctions. If you wish, both hearings may be held at the same time. The same judge may not sit on both hearings unless you expressly agree thereto. In this particular case, you have a right to both hearings, but may waive the preliminary hearing if you wish.

(2) This hearing will be a final hearing on the issue of whether your probation shall be revoked and additional sanctions imposed.

You have the following rights:

(1) A right to legal counsel, and if you are unable to afford counsel, the Court will appoint counsel for you.

(2) A right to be confronted by the person alleging you have violated the terms of your probation and to cross-examine that person as well as any other persons who testify against you.

(3) A right to insist that all testimony by under oath.

(4) A right to remain silent and not to be prejudiced thereby.

(5) A right to testify on your own behalf, to produce witnesses and other evidence to support your denial of the alleged violation(s), or in a final revocation hearing to support the explanation of mitigation of any violation.

The notice of the alleged violation(s) of probation is as follows:

Alleged Violation(s)	Date	Place

Do not fail to appear in Court at the time and place ordered above. You may then request a continuance if additional time is required to protect your rights.

ate: _____ Signature _____

Assent to Immediate Hearing

I, _____, having received the foregoing notice, hereby assent to an immediate hearing.

OCP-Form 7A

The Commonwealth of Massachusetts

THE TRIAL COURT

_____, ss. Department_____

Division _____

No. (s):

COMMONWEALTH

vs.

WAIVER OF COUNSEL

I, _____ have been informed of my right
(Name of Defendant)
pursuant to General Rule 3:10 of the Rules of the Supreme Judicial Court, to have counsel to represent me at every stage of the proceedings in this case. I elect to proceed in these probation revocation proceedings without counsel and waive my right to such appointment.

Signed _____

_____19

CERTIFICATE OF JUDGE

I, _____, hereby certify that _____
(Name of Judge)

_____, has been informed of his/her right
(Name of Defendant)

to have counsel to represent him/her at every stage of the proceedings in this case; that he/she has elected to proceed without counsel in these probation revocation proceedings, and that he/she has executed the above waiver in my presence.

_____
Signature of Judge

_____19

2500-6-81-163858

The Commonwealth of Massachusetts

THE TRIAL COURT

_____, ss. Department _____

Division _____

No. (s):

COMMONWEALTH

vs.

WAIVER OF RIGHT TO PRELIMINARY HEARING FOR VIOLATION OF PROBATION

I, _____ have been informed of my right,
(Name of Defendant)
to a preliminary hearing on charges of violation of probation, and I hereby waive my right to such preliminary hearing.

Signed _____
Signature of Defendant

_____ 19

CERTIFICATE OF JUDGE

I, _____,
(Name of Judge)

hereby certify that _____
(Name of Defendant)

has been informed of his/her right to a preliminary hearing on charges of violation of probation and that he/she executed the above waiver in my presence.

_____
Signature of Judge

_____ 19

2500-6-81-163858

The Commonwealth of Massachusetts

THE TRIAL COURT

_____, ss. Department _____

Division _____

COMMONWEALTH

vs.

PROBATION REVOCATION PROCEEDINGS
FINDINGS AND ORDERS

1. Due notice given to defendant and copy thereof filed with papers ☐

OR

Notice given and Assent to immediate hearing filed with Papers ☐

OR

2. This report is on a preliminary hearing to determine probable cause ☐

OR

This report is on a final hearing, probable cause having previously been determined (and if determined by me, the defendant having expressly agreed to my sitting on the final hearing) ☐

OR

This report is on a combination hearing, the defendant having duly waived the preliminary hearing and copy of waiver filed with papers ☐

3. I hereby make a determination of probable cause to believe ☐

OR

I hereby make a final finding that defendant violated his or her probation in the following respects:

2500-6-81-163858

4. I hereby find no probable cause to believe that defendant violated his or her probation ☐

OR

I hereby find that defendant did not violate his or her probation ☐

5. Included in the evidence upon which rely is the following:

6. I therefore hereby order:

7. Additional reasons, if any:

8. Date or dates of this hearing before me:

....

Date Justice

FINES AND SURFINES

5:00 General. THE IMPOSITION OF A FINE AFTER ENTRY OF A FINDING OF GUILTY CONSTITUTES A SENTENCE. IT IS AN EFFECTIVE DISPOSITIONAL TOOL IN THAT THE DEFENDANT IS HELD FINANCIALLY ACCOUNTABLE FOR HIS OR HER ACTIONS.

A FINE MAY BE USED ONLY WHEN AUTHORIZED BY STATUTE OR PURSUANT TO G.L. c. 279, s. 5.

FINES ARE SPECIFICALLY PROVIDED FOR BY STATUTE IN ONE OF THE FOUR FOLLOWING FORMS: (1) A FINE AS THE SOLE DISPOSITION; (2) A FINE OR SENTENCE OF IMPRISONMENT; (3) A FINE OR SENTENCE OF IMPRISONMENT, OR BOTH; AND (4) A FINE AND SENTENCE OF IMPRISONMENT.

COURT COSTS CANNOT BE IMPOSED AS A SUBSTITUTE FOR A FINE.

A "SPECIAL COST ASSESSMENT" (OR SURFINE) TO OFFSET THE COST OF CRIMINAL JUSTICE TRAINING MUST BE LEVIED IN AN AMOUNT EQUAL TO 25% OF THE FINE IMPOSED AS A PUNISHMENT FOR A CRIME OTHER THAN A MINOR MOTOR VEHICLE OFFENSE, JUVENILE OFFENSE OR ACT OF DELINQUENCY. A "MINOR MOTOR VEHICLE OFFENSE" IS DEFINED BY STATUTE AS A MOTOR VEHICLE OFFENSE WHICH IS NOT PUNISHABLE BY INCARCERATION.

AN "ASSESSMENT" FOR THE BENEFIT OF THE VICTIM AND WITNESS ASSISTANCE FUND MUST BE MADE AGAINST ANY PERSON SEVENTEEN YEARS OF AGE OR OLDER WHO HAS BEEN CONVICTED OF, OR AGAINST WHOM A FINDING OF SUFFICIENT FACTS HAS BEEN MADE ON A COMPLAINT CHARGING, A FELONY OR A MISDEMEANOR AND ANY PERSON FOURTEEN

YEARS OF AGE OR OLDER WHO IS ADJUDICATED DELINQUENT OR AGAINST WHOM A FINDING OF SUFFICIENT FACTS FOR A DELINQUENCY FINDING IS MADE. THE ASSESSMENT IS $25 IN THE CASE OF A FELONY AND $15 IN THE CASE OF A MISDEMEANOR OR A DELINQUENCY CHARGE.

COMMENTARY

There are four types of statutes which authorize imposition of a fine in conjunction with a finding of guilty: (1) A fine as the sole disposition (e.g. G.L. c. 85; G.L. c. 90, minor motor vehicle offenses); (2) a fine or sentence of imprisonment (e.g. G.L. c. 265, s. 13A, assault and assault and battery); (3) a fine or sentence of imprisonment, or both (e.g. G.L. c. 90, s. 24(2)(a), operating to endanger); and (4) a fine and sentence of imprisonment (e.g. G.L. c. 90, s. 24 (1)(a), driving under the influence of intoxicating liquor or drugs, second or subsequent offense). But see G.L. c. 279, s. 11.

The purpose of the surfine statute is to offset the cost of training in the criminal justice system. The applicable statute relating to surfines, G.L. c. 280, s. 6A, reads in relevant part as follows:

> Before imposing a fine or forfeiture as a punishment or part punishment for a crime, the court or justice shall levy as a special cost assessment an amount equal to twenty-five per cent of the fine or forfeiture; provided however, that no special cost assessment shall be levied on fines or forfeitures for minor motor vehicle offenses, and juvenile offenses or acts of delinquency. Minor motor vehicle offenses shall be defined as those not punishable by incarceration.

Where a defendant is sentenced to pay a fine and "to stand committed until it is paid," the court may suspend the execution of the fine and surfine and place the defendant on probation pending payment by a specified date. G.L. c. 279, s. 1 and G.L. c. 280, s. 6A. Upon the partial or complete suspension

of payment of a fine, the surfine must be proportionately suspended. G.L. c. 280, s. 6A.

The assessment for the benefit of the Victim and Witness Assistance Fund is provided for in G.L. c. 258B, s. 8, which also states in pertinent part:

> When multiple offenses arising from a single incident are charged, the total assessment shall not exceed twenty-five dollars, provided however, that the total assessment against a person who has not attained seventeen years shall not exceed fifteen dollars. In the discretion of the court, any assessment imposed pursuant to this section which would cause the person against whom the assessment is imposed severe financial hardship, may be reduced or waived.

The funds in the Victim and Witness Assessment Fund are, subject to appropriation, available to the Victim and Witness Assistance Board for disbursement to programs providing comprehensive services to victims and witnesses.

If a fine does not exceed $15.00 and the court finds that the defendant is unable to pay it when imposed, G.L. c. 279, s. 1 provides that

> the execution of the sentence shall be suspended and he may in its discretion be placed on probation, unless the court shall find that he will probably default, or that such suspension will be detrimental to the interests of the public.

If a defendant is sentenced both to pay a fine and to serve a period of imprisonment, the mittimus must state the term of incarceration first. Unless the court suspends the execution of the sentence and places the defendant on probation, the defendant will serve the sentence of commitment first. G.L. c. 279, ss. 1A, 8.

A fine should be distinguished from court costs. See Standard 9:03.

A fine may be imposed in accordance with "custom and usage," G.L. c. 279, s. 5. See Standard 7:12.

5:01 Payment Orders and Schedules. IF A FINE (AND A SURFINE OR VICTIM-WITNESS ASSESSMENT, WHERE APPLICABLE) IS TO BE PAID IN INSTALLMENTS, THE FINAL PAYMENT SHOULD BE SUSPENDED TO A SPECIFIED DATE, AND THE DEFENDANT SHOULD BE RELEASED UNDER CONDITIONS OF PROBATION.

A DEFENDANT MUST BE PLACED ON PROBATION IF THE EXECUTION OF A SENTENCE OF IMPRISONMENT IS SUSPENDED AND A FINE (AND SURFINE) IS IMPOSED. G.L. c. 279, s. 1A.

FULL PAYMENT MAY BE MADE TO THE CLERK-MAGISTRATE FORTHWITH OR TO THE PROBATION OFFICE IN INSTALLMENTS. NO EXTENSION OF TIME FOR PAYMENT MAY BE AUTHORIZED BY A PROBATION OFFICER WITHOUT APPROVAL OF THE JUDGE.

COMMENTARY

On the date that the Judge enters a finding of guilty and imposes a fine (and surfine or victim-witness assessment), the defendant may be unable to pay the full amount or any portion thereof. The Judge may suspend payment for a specified period of time. Installment payments should be made to the probation office.

See Standard 5:02 for a discussion of the options available to a Judge when a defendant fails to pay by the date ordered by the court; and Standard 6:00 concerning suspended sentences.

Surfines are authorized by G.L. c. 280, s. 6A.

5:02 Violation of Payment Order. UPON A DEFENDANT'S FAILURE TO PAY A FINE (AND SURFINE OR VICTIM-WITNESS ASSESSMENT, WHERE APPLICABLE) WITHIN THE TIME ORDERED BY THE COURT, THE JUDGE, AFTER HEARING, MAY EXTEND THE TIME FOR PAYMENT; REMIT THE PAYMENT AND PLACE THE CASE ON FILE; OR REVOKE THE SUSPENSION OF THE SENTENCE OF A FINE AND ORDER THE DEFENDANT COMMITTED.

COMMENTARY

A Judge has three alternatives when the defendant fails to comply with the court's payment order.

1. When the defendant has made a good faith effort to make payments but has been unable to complete payment in accordance with the court's order, the Judge may extend the time for payment.

2. The Judge may remit payment and place the case on file when the defendant's nonpayment is attributed to a financial inability to pay.

3. If the defendant has wilfully failed to comply with the court's order, the Judge may revoke the suspension of the fine and order the defendant committed. G.L. c. 279, ss. 1, 1A. Such action should be taken only if the Judge has conducted a hearing into the defendant's resources and capacity to pay and has determined that the defendant's nonpayment is not a result of indigency. Tate v. Short, 401 U.S. 395, 91 S. Ct. 668 (1971). A Judge may not automatically revoke a defendant's probation for failure to pay a fine or order of restitution that was imposed as a condition of probation, but must first determine "that the probationer has not made sufficient bona fide efforts to pay or that adequate alternative forms of punishment did not exist." Bearden v. Georgia, 103 S.Ct. 2064 (1983).

If the defendant is committed for wilful nonpayment of a fine, the mittimus should contain a recital of the findings of the court in which further suspension of the fine is denied by the court. G.L. c. 279, s. 1; Ariel v. Comm., 356 Mass. 194, 248 N.E.2d 496 (1969). Where a fine is originally suspended and the suspension is later vacated, the mittimus should contain a recital of the findings of the court as to the defendant's capacity to pay.

A defendant who is imprisoned for wilful nonpayment of a fine is to be given credit of $3.00 for each day confined. G.L. c. 127, s. 144. If the defendant has been confined in a jail or house of correction for three months and the court finds that, since the confinement, the defendant has no assets to pay the fine, the court must order the defendant's discharge. G.L. c. 127, ss. 144, 146.

What is said in this standard with regard to fines also applies to surfines and victim-witness assessments.

SUSPENDED SENTENCE

6:00 General
6:01 Revocation of Probation Imposed in Conjunction with Suspension of Sentence

Standards for Sentencing
and Other Dispositions
Standard 6:00

6:00 General. UNLESS PRECLUDED BY THE STATUTE DEFINING THE OFFENSE WITH WHICH THE DEFENDANT IS CHARGED, THE JUDGE MAY SUSPEND THE EXECUTION OF A SENTENCE OF IMPRISONMENT, IN WHOLE OR IN PART. IF THE SENTENCE IS SUSPENDED, THE DEFENDANT MUST BE PLACED ON PROBATION. G.L. c. 279, s. 1.

SUBJECT TO EXCEPTIONS NOTED IN THE COMMENTARY, THE JUDGE MAY SUSPEND THE EXECUTION OF SENTENCES OF A FINE AND IMPRISONMENT, IN WHOLE OR IN PART. IF THE SENTENCES ARE SUSPENDED, THE DEFENDANT MUST BE PLACED ON PROBATION. G.L. c. 279, s. 1A.

A JUDGE WHO SUSPENDS THE EXECUTION OF A SENTENCE OF IMPRISONMENT, OR FINE AND IMPRISONMENT, MUST NOT INCREASE THE PENALTY OR WITHDRAW OR REVOKE THE SUSPENSION OF SAID SENTENCE UPON THE DEFENDANT'S APPEAL TO THE JURY SESSION.

COMMENTARY

Unless prohibited by the statute defining the offense with which the defendant is charged, all sentences may be suspended, including concurrent and consecutive sentences.

A suspended sentence must be accompanied by probation. G.L. c. 279, ss. 1, 1A. See Standard 5:01. The period of probation may exceed the term of the sentence imposed. King v. Comm., 246 Mass. 57, 140 N.E. 253 (1923).

When a sentence is suspended and the probationary period has been completed satisfactorily, the Judge has "no authority to revoke the order suspending the sentence, place the case on file, and hold the threat of a sentence over a defendant's head forever . . . ." Pino v. Nicolls, 119 F. Supp. 122, 127 (D. Mass. 1954); Comm. v. Maloney, 145 Mass. 205, 13 N.E. 482 (1887).

Note that sentences of a fine and imprisonment may not be suspended and a defendant placed on probation where a defendant has previously been convicted of "a crime an element of which is being armed with a dangerous weapon, or of any other felony if it shall appear that he has been previously convicted of any felony." G.L. c. 279, s. 1A.

It is a constitutional violation for a Judge to increase a defendant's punishment based on the exercise of a right of appeal. Comm. v. Souza, 390 Mass. 813, 820, 461 N.E.2d 166, 171 (1984). See North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072 (1969).

6:01 Revocation of Probation Imposed in Conjunction with Suspension of Sentence. (G.L. c. 279, s. 3). IMMEDIATELY UPON THE REVOCATION OF PROBATION FOR VIOLATION OF THE CONDITIONS OF PROBATION, THE COURT MUST VACATE THE SUSPENSION AND ORDER THE EXECUTION OF ANY SENTENCE PREVIOUSLY IMPOSED IN CONJUNCTION WITH SUCH PROBATION. THERE IS NO AUTHORITY TO VACATE THE SUSPENSION AND ORDER EXECUTION OF MORE OR LESS THAN THE ENTIRE SENTENCE ORIGINALLY IMPOSED.

COMMENTARY

This standard takes the position that when a defendant is found to have violated his or her probation after a formal probation revocation hearing, probation should be revoked and the entire sentence that was previously imposed but suspended must be executed. G.L. c. 279, s. 3. In effect the Judge vacates the suspension of the sentence and affirms the sentence. However, the Judge, at the probation revocation hearing, may determine that a probation violation, though proved, is not sufficient to warrant probation revocation. In such a case the Judge may continue the probation with new terms, if appropriate.

See Standard 4:04 for a discussion of probation revocation, and Standard 8:00 on motions to revise and revoke sentences pursuant to Mass. R. Crim. P. 29.

Standards for Sentencing
and Other Dispositions
Standard 7:00

7:00 General. DEPENDING ON THE CIRCUMSTANCES OF THE CASE AND THE INDIVIDUAL DEFENDANT, THE GOALS OF PUNISHMENT, REHABILITATION AND DETERRENCE MAY BE ACHIEVED BY INCARCERATION. THE GOAL OF INCAPACITATION IS ALWAYS SERVED BY INCARCERATION.

STANDARDS 7:00 THROUGH 7:12 ENCOMPASS ALL TYPES OF DISPOSITIONAL TECHNIQUES THAT INVOLVE INCARCERATION.

COMMENTARY

Incarceration should be used in the disposition of a criminal case when other forms of punishment will not, in the opinion of the sentencing Judge, be adequate, or when mandated by statute. See Standard 7:10 on mandatory sentencing.

As explained in Standard 1:01, the four basic goals of sentencing, viz, punishment, deterrence, rehabilitation and incapacitation, should be considered by the court in determining the punishment to be imposed after a finding or plea of guilty. Once the goals of sentencing are decided, then the type of sentence can be selected. Unless mandated by statute, the many forms that incarceration can take--"special" sentencing, indefinite sentencing, concurrent sentencing, etc.--not to mention the length of the sentence, should be decided with reference to the purpose or goal the Judge has in mind. It is to be noted that under regulations of the Department of Correction and Parole Board, the defendant probably will not serve the full sentence imposed by the Judge.

7:01 Jurisdiction of District Court. THE DISTRICT COURT HAS ORIGINAL, CONCURRENT JURISDICTION WITH THE SUPERIOR COURT OF THE OFFENSES SET FORTH IN G.L. c. 218, s. 26.

JUDGES IN THE DISTRICT COURT MAY IMPOSE PENALTIES AS DEFINED BY STATUTE FOR ALL CRIMES OF WHICH THEY HAVE JURISDICTION.

COMMENTARY

Several general statutory provisions regarding the authority of the District Court to order incarceration should be mentioned here:

1. The District Court may impose penalties to a maximum of two-and-one-half years for each offense for all crimes of which they have jurisdiction, except that a sentence to a state prison (i.e. MCI-Walpole) may not be imposed. G.L. c. 218, s. 27. Where the District Court maintains jurisdiction over an offense pursuant to G.L. c. 218, s. 26, "a District Court has discretion to sentence violators of such felonies to correctional facilities other than state prison" even though the statute does not provide for an alternative jail or house of correction sentence. Comm. v. Graham, 388 Mass. 115, 445 N.E.2d 1042 (1983). See, e.g. G.L. c. 266, s. 17. The aggregate of sentences imposed for multiple offenses may exceed two-and-one-half years. G.L. c. 279, s. 23.

2. If no punishment is provided for by the statute defining the crime, the court "shall impose such sentence, according to the nature of the crime, as conforms to the common usage and practice in the Commonwealth." G.L. c. 279, s. 5. See Standard 7:12 on custom and usage sentencing.

3. If a sentence of incarceration is more than six months and is not suspended, the defendant must be brought back to the District Court one day after the imposition of the sentence for the order of commitment and be notified again of his or her

right of appeal to a jury-of-six session in the District Court (G.L. c. 218, s. 31), unless an appeal is taken immediately upon the imposition of sentence. This does not apply when the sentence is imposed in the jury session. The statute is silent on whether this statutory provision can be waived, although it is a common practice to do so.

4. General Laws c. 218, s. 26 confers jurisdiction on the District Court over "all felonies punishable by imprisonment in the state prison for not more than five years" and those other offenses recited in G.L. c. 218, s. 26:

-- all violations of bylaws, orders, ordinances, rules and regulations, made by cities, towns and public officers

-- all misdemeanors, except libels

-- crimes of escape or attempt to escape from any penal institution (G.L. c. 268, s. 16)

-- crimes of forgery of a promissory note, or of an order for money or other property, and of uttering as true such a forged note or order knowing the same to be forged

-- crime of indecent assault and battery on a child under fourteen years of age (G.L. c. 265, s. 13B)

-- crime of assault and battery with a dangerous weapon (G.L. c. 265, s. 15A)

-- crime of breaking in the night time a building or ship with intent to commit a felony (G.L. c. 266, s. 16)

-- crime of entering in the night time or breaking and entering in the daytime a building, ship or vessel with intent to commit a felony, the owner or other person lawfully therein being put in fear (G.L. c. 266, s. 17)

-- crime of entering without breaking a dwelling house in the night time or breaking and entering a building, ship or vessel in the daytime with intent to commit a felony, no person lawfully therein being put in fear (G.L. c. 266, s. 18)

-- crime of breaking and entering a railroad car with intent to commit a felony (G.L. c. 266, s. 19)

-- crime of theft or concealment of motor vehicles or concealment of a motor vehicle thief (G.L. c. 266, s. 28)

-- crime of making, possessing or using burglarious instruments or motor vehicle master keys (G.L. c. 266, s. 49)

-- crime of wilful and malicious destruction of personal and real property (G.L. c. 266, s. 127)

-- crime of motor vehicle homicide (G.L. c. 90, s. 24G(a)).

General Laws c. 218, s. 26 is frequently amended and constant recourse to the statute is recommended.

District Court Judges may sentence a defendant to a jail or house of correction for a maximum of two-and-one-half years for each offense. G.L. c. 279, ss. 19 and 23. For common law crimes within the jurisdiction of the District Court (e.g. resisting arrest, affray), sentences of imprisonment may not exceed two-and-one-half years. Of course, a defendant may be sentenced on two or more offenses for an aggregate of more than two-and-one-half years, and if the sentences are imposed "from and after," the period of confinement may exceed two-and-one-half years.

The court may order that a sentence to a jail or house of correction be served in any county. G.L. c. 279, s. 15. By directive of the Chief Administrative Justice (March 11, 1981), Judges are advised, as a result of overcrowded conditions in county correctional facilities, to "sentence prisoners to those institutions located within the county where sentence is imposed." The Department of Correction and the sheriffs, pursuant to G.L. c. 127, s. 97, may transfer prisoners to other facilities as prison conditions dictate.

For a reference to indefinite sentencing to MCI-Concord and MCI-Framingham, see Standards 7:07 and 7:08 and G.L. c. 279, ss. 16, 18, 19, 31, 33, and G.L. c. 125, s. 16.

7:02 "Split Sentencing." (G.L. c. 279, ss. 1, 1A). "SPLIT SENTENCING" INVOLVES THE IMPOSITION OF A TERM OF INCARCERATION WITH THE EXECUTION OF PART OF THAT TERM SUSPENDED. AFTER A SENTENCE OF INCARCERATION IS ORDERED, A PORTION OF THAT SENTENCE MAY BE ORDERED TO BE SERVED AND THE BALANCE SUSPENDED. PROBATION MUST BE IMPOSED IN CONJUNCTION WITH THE SUSPENDED PORTION OF THE SENTENCE. THE PERIOD OF PROBATION MAY EXTEND BEYOND THE TERM OF THE SENTENCE.

COMMENTARY

Split sentencing is a technique which may be used when the court determines that both incarceration and suspension of sentence with probation are appropriate. For example, the defendant may be sentenced as follows: one year to the house of correction, six months committed, six months suspended, with probation for two years.

The entire sentence of imprisonment, including that portion which is suspended, is considered by the Parole Board in determining parole eligibility. Att. Gen. Op. No. 4, 1976-1977.

The period of probation may exceed the term of the sentence imposed. King v. Comm., 246 Mass. 57, 140 N.E. 253 (1923).

7:03 Concurrent Sentencing. (G.L. c. 279, s. 8). "CONCURRENT SENTENCING" INVOLVES SENTENCING A DEFENDANT TO INCARCERATION ON TWO OR MORE CONVICTIONS WITH THE SEPARATE TERMS OF IMPRISONMENT COMMENCING SIMULTANEOUSLY; OR SENTENCING FOR ONE OR MORE CRIMES WHERE THE SENTENCE OR SENTENCES ARE TO BE SERVED SIMULTANEOUSLY WITH A SENTENCE OR SENTENCES THEN BEING SERVED BY THE DEFENDANT.

COMMENTARY

Concurrent sentences are served simultaneously. G.L. c. 279, s. 8. A sentence may be imposed concurrently with a sentence simultaneously imposed or with a sentence then being served. There is no retroactive application of a concurrent sentence for time already served on a prior sentence, since a concurrent sentence begins on the day it is imposed. Chalifoux v. Commissioner of Correction, 375 Mass. 424, 377 N.E.2d 923 (1978).

The choice between concurrent sentencing and consecutive (or "from and after") sentencing, covered in Standard 7:04, involves the actual time to be served by the defendant. Two or more consecutive sentences differ substantially in terms of time to be served from concurrent sentences for the same crimes in which the same total time is imposed.

A District Court Judge cannot impose a sentence concurrent with a sentence then being served in a state prison. If a defendant is currently serving a sentence in state prison and is convicted of another crime by a District Court Judge, a sentence of incarceration cannot run concurrently with the state prison sentence.

7:04 "From and After" Sentencing. (G.L. c. 279, s. 8A).

"FROM AND AFTER" SENTENCING INVOLVES SENTENCING ON TWO OR MORE CONVICTIONS WHERE THE SENTENCES ARE TO TAKE EFFECT CONSECUTIVELY OR WHERE A SENTENCE IS TO BE SERVED AFTER ANY SENTENCE THEN BEING SERVED OR TO BE SERVED.

A SENTENCE ORDERED TO TAKE EFFECT FROM AND AFTER THE EXPIRATION OF A SENTENCE THEN BEING SERVED OR TO BE SERVED GOES INTO EFFECT WHEN THE PRIOR SENTENCE OR SENTENCES HAVE TERMINATED.

COMMENTARY

In calculating the effective date of a "from and after" sentence, the Department of Correction deems the previous sentence or sentences to have terminated "when the prisoner serving it is released therefrom by parole or otherwise." Carlino v. Commissioner of Correction, 355 Mass. 159, 243 N.E.2d 799 (1969). Additionally, a "from and after" sentence ordered to take effect after the termination of concurrent sentences of different lengths takes effect from and after the expiration of the longer sentence. Carlino, supra.

In Petition of Stewart, 381 Mass. 773, 411 N.E.2d 177 (1980), where the defendant was on escape status when convicted of a subsequent offense, the Court held that a sentence imposed by a Judge to take effect "from and after the expiration of a sentence said defendant is presently serving" evidenced an intent by the Judge to impose consecutive sentences even though the defendant was not "presently serving" a sentence.

Where a mittimus states that a sentence is to be served from and after a sentence now being served or to be served, the sentence begins on completion of the term that the defendant last serves. Kerrigan v. McGrath (Suffolk Sup. Ct. Docket No. 76088, October 2, 1959) and Op. Att. Gen., May 27, 1960.

A defendant serves sentences of imprisonment in the order named in the mittimuses. If one of the sentences names both a fine and imprisonment, the defendant must be committed first on the sentence of imprisonment. G.L. c. 279, s. 8.

7:05 "Forthwith" Sentencing. (G.L. c. 279, s. 28). A "FORTHWITH" SENTENCE IS A SENTENCE WHICH THE COURT ORDERS TO TAKE EFFECT "FORTHWITH," NOTWITHSTANDING A PRIOR SENTENCE BEING SERVED BY A DEFENDANT.

COMMENTARY

A District Court Judge may impose a forthwith sentence to a house of correction upon a defendant then incarcerated at MCI-Concord. However, it has been held in a case of first impression in Massachusetts that "a prior MCI-Concord sentence survives a forthwith sentence to a house of correction under G.L. c. 279, s. 28, as amended." Dale v. Commissioner of Correction, 17 Mass. App. Ct. 247, 251, 457 N.E.2d 652, 654 (1983). The defendant will serve the balance of the MCI-Concord sentence after the house of correction sentence is served.

The law does not provide for a forthwith sentence from MCI-Framingham to a house of correction, from a house of correction to MCI-Concord, from a house of correction to MCI-Framingham, and from one house of correction to another house of correction. As there is no specific authorization for these sentences, they should not be imposed.

7:06 Weekend or "Special" Sentencing. (G.L. c. 279, s. 6A; G.L. c. 90, s. 24(1)(a)(3)). SENTENCES OF INCARCERATION ON WEEKENDS, HOLIDAYS, OR OTHER PERIODIC INTERVALS ARE GOVERNED BY STATUTE. SUCH SENTENCING IS KNOWN AS "SPECIAL SENTENCING" AND MAY BE USED FOR ALL OR PART OF A SENTENCE IMPOSED.

COMMENTARY

Pursuant to G.L. c. 279, s. 6A, the court may order that a sentence be served in whole or in part on weekends and legal holidays, or in any other periodic interval. Such sentencing is permissible only when the defendant is being sentenced for a first offense for a term that does not exceed one year. Additionally, sentencing "on designated weekends, evenings or holidays" is specifically authorized by G.L. c. 90, s. 24 (1)(a)(3) for a defendant convicted of driving under the influence of intoxicating liquor or drugs.

The offender must, unless otherwise ordered by the court, report to the institution to which he or she was sentenced not later than 6:00 p.m. on Friday and be released by 7:00 a.m. on Monday. The total time served must be equal to the period of incarceration imposed. The Department of Correction, in calculating the total time served, considers a weekend to consist of four days--Friday, Saturday, Sunday, and Monday--unless Monday is a holiday, in which case the weekend is counted as five days.

The mittimus should contain the specific dates and times for commitment (i.e. sentence of four months to a house of correction, twenty days to be served on five consecutive weekends, the balance to be suspended). A special sentence form has been developed for use with special sentences of imprisonment.

A court officer or person authorized to transport prisoners should bring the defendant, the special sentencing form and the mittimus to the place of incarceration for identification and

initial booking in advance of the Friday 6:00 p.m. deadline, or as otherwise ordered by the court. See Administrative Directive No. 1-81 from the Chief Administrative Justice (July 1, 1981) and District Court Bulletin No. 2-78, Item 14 (May 2, 1978).

The defendant may be sanctioned for failure to comply with the special sentence of imprisonment. On application of the offender, the Department of Correction or the director of the institution to which the offender is committed (or upon its own motion, the court) may, after hearing, rescind or modify a special sentence of imprisonment and direct that the balance of the sentence be served consecutively. G.L. c. 279, s. 6A.

If the offender, while serving a special sentence of imprisonment, is convicted of a subsequent offense, other than a non-moving motor vehicle violation, the terms of the special sentence must be rescinded and the defendant must complete the balance of the original sentence consecutively. G.L. c. 279, s. 6A. Under G.L. c. 90, s. 24(1)(a)(3), this provision of s. 6A does not apply to the offense of driving under the influence of intoxicating liquor or drugs.

Following this standard are instructions and Administrative Directive No. 1-81 (July 1, 1981) from the Chief Administrative Justice, which include a special sentencing form and mittimus for the imposition of special sentences of imprisonment.

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
OFFICE OF THE CHIEF ADMINISTRATIVE JUSTICE
BOSTON. 02108

TO: Administrative Justices of the Trial Court
Commissioner of Probation

FROM: Arthur M. Mason, Chief Administrative Justice

DATE: July 1, 1981

RE: SPECIAL SENTENCES OF IMPRISONMENT

The use of special sentences of imprisonment pursuant to General Laws, Chapter 279, Section 6A has created problems within the correctional and court systems. It is the intent of the enclosed Administrative Directive to address certain of these problems by adopting uniform forms and procedures to govern various aspects of the use of special sentences.

The Directive is based on the final report of the Special Sentence of Imprisonment Committee which was established to study the issues arising from the use of weekend, holiday and other periodic interval commitments, and to develop procedures and forms for use in those Departments exercising criminal jurisdiction. The Committee was composed of representatives of the Judiciary, Clerk-Magistrates, Probation Department and correctional institutions.

The three major areas of concern arising from the use of special sentences were identified by the Committee as follows: ambiguity in the order of the court imposing a special sentence of imprisonment; difficulty in enforcing weekend sentences; and problems experienced by correctional facilities in managing weekend sentences.

The uniform forms and procedures promulgated by this Directive address the first of these concerns by insuring precision in the order of the court imposing a special sentence of imprisonment. The special sentencing form and the mittimus state with specificity the terms under which a prisoner is to be confined. Use of these forms should clarify any ambiguities existing due to the language currently being used in imposing such sentences.

There are two types of problems related to the enforcement of special sentences. The first deals with insuring that the person sentenced is the person who arrives at the institution. Positive steps to require proper identification are necessary to eliminate the risk that prisoners will not appear or will send someone else in their place.

(over)

To address the problem of insuring proper identification the following procedure is established and incorporated into the special sentencing form. At the time a special sentence of imprisonment is imposed a stay of execution shall be ordered by the court until a convenient time on the Friday (or other day) on which service of the special sentence is to commence.

Defendants shall be ordered to appear in person at the court at the time specified for commencement of the sentence for purposes of proper identification and transportation to the correctional facility. During the stay of execution, defendants are to be held on the same recognizance as during trial or such other recognizance as the court shall order.

The remaining problem relating to enforcement of special sentences concerns sanctions for failure to appear and serve such a sentence. The language of the special sentencing form was drafted to attempt to insure that prisoners appear at the appointed time and that effective sanctions are available in the event that prisoners do not appear as scheduled. The sentencing form has been structured so that the offender's obligation to appear at the time specified has been defined and included in the form as a special term of probation. Failure of an offender to appear as scheduled may then be construed as a probation violation resulting in the institution of a probation surrender hearing.

General Laws, Chapter 279, Section 6A also contains sanctions for failure to appear since it provides that upon application of the department of correction or the director of the institution to which the offender is committed, or on its own motion, the court may, after a hearing, rescind or modify an order for a special sentence of imprisonment and direct that the balance of the sentence be served consecutively.

Problems may also arise when a prisoner seeks to receive permission in advance to arrive late or not to appear on a certain weekend. Although only a judge may modify a sentence and authorize an absence or late arrival, the Directive provides for the Probation Department to facilitate the process of acting on requests for excused non-attendance or late arrival.

To minimize the problems experienced in correctional facilities with the management of offenders serving special sentences of imprisonment, the language of the special sentencing form has been drafted to clearly inform the defendant that violation of institutional rules and regulations will be cause for modification or rescission of a special sentence. The order also makes arrival at the institution under the influence of intoxicating liquor or certain drugs a violation of a special term of probation.

Therefore, to address the problems arising from use of special sentences of imprisonment, the enclosed Administrative Directive is promulgated effective August 1, 1981.

You are requested to distribute the Directive together with the appropriate instructions to the Justices, Clerk-Magistrates and Chief Probation Officers in your Departments. Each Division of the Trial Court will be responsible for making the enclosed forms available for use.

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
OFFICE OF THE CHIEF ADMINISTRATIVE JUSTICE
BOSTON, 02108

ADMINISTRATIVE DIRECTIVE NO. 1-81

TO: Justices of the Trial Court
Commissioner of Probation
Clerk-Magistrates of the Trial Court
Chief Probation Officers of the Trial Court

FROM: Arthur M. Mason, Chief Administrative Justice

DATE: July 1, 1981

RE: SPECIAL SENTENCES OF IMPRISONMENT

In order to address certain issues arising from the use of special sentences of imprisonment which may be imposed pursuant to General Laws, Chapter 279, Section 6A and to minimize the administrative problems resulting therefrom, the following uniform procedures together with the attached uniform forms are hereby established and promulgated:

I. SENTENCING

Any person sentenced under G.L., Chapter 279, Section 6A shall be informed of the provisions thereof by the Judge at the time of sentencing and shall be provided with a copy of the special sentencing form promulgated herein which shall be completed in full by the Office of the Clerk-Magistrate of the sentencing court. A copy of said form shall be provided the Chief Probation Officer of the sentencing court to be made part of the defendant's probation file, and a copy shall be transmitted together with other commitment documents to the appropriate correctional institution.

The Judge should be satisfied that the defendant understands the terms and conditions under which he/she is being sentenced and the possible consequences of failure on the part of the defendant to comply with the terms and conditions as set forth.

II. COMMITMENT

The special mittimus promulgated herein shall be issued for a defendant upon whom a special sentence of imprisonment is imposed.

The mittimus for the imposition of a special sentence of imprisonment shall be transmitted to the appropriate correctional institution and a copy of the special sentencing form shall be attached thereto.

(over)

III. PROBATION OFFICE

The Chief Probation Officer (or designee) shall maintain a separate index of those defendants who have been sentenced under G.L., Chapter 279, Section 6A. The Chief Probation Officer (or designee) shall each week verify the attendance at the several correctional institutions of all persons under special sentence from his/her court and, unless otherwise expressly ordered by the court, shall forthwith institute violation of probation surrender proceedings against any person who has not reported for his/her regular weekend commitment. Where a special sentence of imprisonment is imposed in a case heard in a jury of six session, it shall be the responsibility of the Chief Probation Officer in the court in which the case originated to comply with the requirements of this paragraph.

IV. AUTHORIZATION FOR LATENESS OR NON-ATTENDANCE

Only a Justice of the court which imposed the special sentence of imprisonment upon a person may authorize the late reporting or the non-attendance of said person for any period of a special sentence of imprisonment.

A defendant seeking authorization to arrive late or to be absent for any period of a special sentence of imprisonment shall so request in writing and deliver said request to the Chief Probation Officer (or designee) no later than 24 hours before the time scheduled for the incarceration.

The Chief Probation Officer (or designee) shall transmit the request to a Judge of the committing court, and in a case heard in a jury of six session, a Judge in the court in which the case originated, and, thereafter, inform the person making the request of the Judge's decision.

In the event the request is allowed, the Chief Probation Officer (or designee) shall forthwith orally so inform the appropriate correctional institution and shall confirm the allowance of the request in writing as soon as practicable thereafter.

In the event an individual is unable to make his/her request within the time period described above and is unable to appear for incarceration at the appointed time, he/she shall contact the Chief Probation Officer (or designee) at the earliest possible time thereafter to arrange for appearance before the court on a surrender hearing, unless otherwise expressly ordered by the court.

If the defendant fails to contact the Chief Probation Officer (or designee) as provided herein, the Chief Probation Officer (or designee) shall forthwith institute violation of probation surrender proceedings.

Arthur M. Mason
Chief Administrative Justice

MITTIMUS

TRIAL COURT OF THE COMMONWEALTH

_____, ss.

_____Division

_____Department

To the Sheriff of County, the Superintendent of House of Correction/Jail of County and defendant,

Greeting:

Whereas by consideration of said court holden at within and for the County of

for the transaction of criminal business, on the day of ,

in the year of our Lord one thousand nine hundred and ;

was convicted of the crime of:

and a sentence of (days) was imposed; (part of) which sentence is to

be served within the precincts of the county/Jail/House of Correction as follows:

On _____, 19 __ said defendant shall be confined at _____(County Jail/House of Correction) until _____ (time) on _____ (date) at which time he/she shall be released.

Defendant shall thereafter report to said institution not later than _____(time) on _____(date) and on each successive _____(day of the week or other periodic interval specified by the court) and

(over)

III. PROBATION OFFICE

The Chief Probation Officer (or designee) shall maintain a separate index of those defendants who have been sentenced under G.L., Chapter 279, Section 6A. The Chief Probation Officer (or designee) shall each week verify the attendance at the several correctional institutions of all persons under special sentence from his/her court and, unless otherwise expressly ordered by the court, shall forthwith institute violation of probation surrender proceedings against any person who has not reported for his/her regular weekend commitment. Where a special sentence of imprisonment is imposed in a case heard in a jury of six session, it shall be the responsibility of the Chief Probation Officer in the court in which the case originated to comply with the requirements of this paragraph.

IV. AUTHORIZATION FOR LATENESS OR NON-ATTENDANCE

Only a Justice of the court which imposed the special sentence of imprisonment upon a person may authorize the late reporting or the non-attendance of said person for any period of a special sentence of imprisonment.

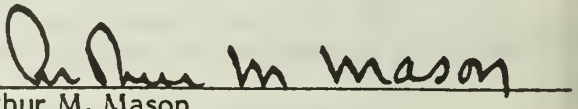
A defendant seeking authorization to arrive late or to be absent for any period of a special sentence of imprisonment shall so request in writing and deliver said request to the Chief Probation Officer (or designee) no later than 24 hours before the time scheduled for the incarceration.

The Chief Probation Officer (or designee) shall transmit the request to a Judge of the committing court, and in a case heard in a jury of six session, a Judge in the court in which the case originated, and, thereafter, inform the person making the request of the Judge's decision.

In the event the request is allowed, the Chief Probation Officer (or designee) shall forthwith orally so inform the appropriate correctional institution and shall confirm the allowance of the request in writing as soon as practicable thereafter.

In the event an individual is unable to make his/her request within the time period described above and is unable to appear for incarceration at the appointed time, he/she shall contact the Chief Probation Officer (or designee) at the earliest possible time thereafter to arrange for appearance before the court on a surrender hearing, unless otherwise expressly ordered by the court.

If the defendant fails to contact the Chief Probation Officer (or designee) as provided herein, the Chief Probation Officer (or designee) shall forthwith institute violation of probation surrender proceedings.



Arthur M. Mason
Chief Administrative Justice

MITTIMUS

TRIAL COURT OF THE COMMONWEALTH

_____, ss.

_____Division

_____Department

To the Sheriff of County, the Superintendent of House of Correction/Jail of County and defendant,

Greeting:

Whereas by consideration of said court holden at within and for the County of

for the transaction of criminal business, on the day of ,

in the year of our Lord one thousand nine hundred and ;

was convicted of the crime of:

and a sentence of (days) was imposed; (part of) which sentence is to

be served within the precincts of the county/Jail/House of Correction as follows:

On _____, 19 __ said defendant shall be confined at _____(County Jail/House of Correction) until _____ (time) on _____ (date) at which time he/she shall be released.

Defendant shall thereafter report to said institution not later than _____(time) on _____(date) and on each successive _____(day of the week or other periodic interval specified by the court) and

(over)

be confined at _____County Jail/House of Correction until _____(time) on the _____(day of the week) unless said date is a holiday,in which case he/she shall not be released until A.M. on the following day.

Unless otherwise ordered by the court the final period of confinement at _____County Jail/House of Correction shall commence on _____(date).

We therefore command you,

the Sheriff/Superintendent of said House of Correction/Jail to receive and confine said

in accordance with this warrant, and you

the said Sheriff/Superintendent are to make return on this warrant with your doings thereon to the Office of the Clerk of said Court as soon as may be.

You are further commanded to inform this court forthwith, by notifying the Chief Probation Officer thereof, of the defendant's failure to report or failure to report on time to your institution, or of any other violation of the terms of his/her special sentence of imprisonment.

WITNESS, , Esquire,

Justice of said Court and the seal of said Court, at

this day of in the year of our Lord one thousand nine hundred and .

Assistant Clerk

RETURN OF SERVICE

County, to wit:

In obedience to the within warrant, I certify that the within named defendant has reported on , 19 and is confined in accordance with the terms of the aforementioned sentence.

Superintendent County House of Correction

County Jail at .

TRIAL COURT OF THE COMMONWEALTH

_____, ss. _____Division
_____Court Dept.

COMMONWEALTH OF MASSACHUSETTS

v.

_____

SPECIAL SENTENCING FORM

TO: _____
Name of Defendant

"You are hereby sentenced to a special sentence of imprisonment under G.L., Chapter 279, S. 6A as follows:

(1) the term of your sentence is _____ days (not to exceed 365 days).

(2) Your sentence is ordered to be served in whole (in part) on weekends and legal holidays or other periodic intervals as follows:

A. On _____, 19__ you shall report in person to this court at _____AM/PM for purpose of commencement of the execution of this sentence and to be identified and transported to _____(County Jail or House of Correction). Until then execution of this sentence is stayed, and you are continued on the same recognizance in which you now stand (or such other recognizance as the court shall order).

(over)

B. You shall be confined at said Jail/House of Correction until _____(time) or _____(date) and be subject to all the rules and regulations of said institution relating to your custody and conduct.

C. You shall report to said institution not later than _____(time) on _____(date) and on each successive _____(day of the week or other periodic interval specified by the court) and be confined at said institution until _____(time) on the following _____(day of week) unless said date is a holiday in which case you shall not be released until _____ (time) on the following day. During each such confinement you shall be subject to all the rules and regulations of said institution relating to your custody and conduct.

D. During your period of release from custody at said County Jail/House of Correcti you are placed on probation in accordance with the following special terms of probation:

(1) That you report on time to the _____County Jail/House of Correction on _____(date) at _____(time) and (upon each successive Friday at 6:00 P.M. or other periodic intervals ordered by the court).

(2) That you not be under the influence of any intoxicating liquor or of marijuana, narcotic drugs, depressants or stimulant substances, all as defined in section one of Chapter 94C of the Massachusetts General Laws in the _____County Jail/House of Correction.

The institution in which you are confined shall also have the right to institute normal disciplinary procedures against you for any violations of its rules and regulations in force relating to your custody and conduct.

I acknowledge receipt of special sentencing form.

_____
Name of Defendant

_____
Justice

_____
Date

_____Division
_____Court Department

TRIAL COURT OF THE COMMONWEALTH

_____, ss. _____Division

_____Department

Commonwealth of Massachusetts

v.

_____

ORDER FOR MODIFICATION OF SPECIAL SENTENCING FORM

On the _____day of _____, 19 , a special sentence of imprisonment under G.L, C.279, s.6A was imposed upon the defendant _____ in the above entitled case in the _____ _____Division of the _____ Court Department.

Said special sentence of imprisonment is hereby modified in the following respect:

_____

_____

_____.

_____
Justice

_____Division
_____Court Department

Date:
cc: Correctional Institution
Probation Office

7:07 Indefinite Sentencing of Male Defendants. (G.L. c. 279, ss. 31 and 33). INDEFINITE SENTENCING IS AVAILABLE IN THE DISTRICT COURT FOR MALE DEFENDANTS WHO HAVE NOT BEEN CONVICTED OF A FELONY MORE THAN THREE TIMES PREVIOUSLY AND WHO ARE CONVICTED OF A CRIME PUNISHABLE BY IMPRISONMENT. IT INVOLVES SENTENCING SUCH DEFENDANTS TO MCI-CONCORD WITH NO SPECIFIC PERIOD OF INCARCERATION ESTABLISHED BY THE COURT. A DEFENDANT SENTENCED BY A JUDGE TO MCI-CONCORD MAY SERVE UP TO THE MAXIMUM TERM AUTHORIZED BY THE STATUTE DEFINING THE OFFENSE AND WITHIN THE JURISDICTION OF THE COURT.

COMMENTARY

The statutes on this subject do not clearly distinguish between the terms "indefinite" and "indeterminate." Since District Court Judges cannot sentence to state prison, they do not render "indeterminate" sentences. "Indefinite" sentencing, on the other hand, is used in referring to sentencing in which the court expresses no minimum or maximum term of imprisonment.

The jurisdiction of the District Court to incarcerate is limited to two-and-one-half years. G.L. c. 279, ss. 18, 19, 23. A defendant who is sentenced by a District Court Judge to MCI-Concord for an indefinite term may serve a maximum sentence of two-and-one-half years, or the lesser term set by the statute defining the offense or as provided in G.L. c. 279, s. 33. Note that under G.L. c. 279, s. 33, the maximum period of incarceration for a defendant convicted of larceny of property of $100 or less is two years. An indefinite sentence may not be imposed if a defendant has been convicted of a felony more than three times previously. G.L. c. 279, s. 31.

In determining whether to sentence a defendant to MCI-Concord, a Judge should have in mind that the indefinite sentence has no established minimum term. This gives the Parole Board

and the Department of Correction considerable discretion in determining when a defendant should be released on parole.

Indefinite sentencing of female offenders is covered in Standard 7:08.

7:08 Sentencing of Female Defendants. (G.L. c. 279, ss. 16, 18 and 19; G.L. c. 125, s. 16). A FEMALE CONVICTED OF A CRIME WHICH BY STATUTE IS PUNISHABLE BY INCARCERATION MAY BE SENTENCED TO A JAIL, OR HOUSE OF CORRECTION, OR TO MCI-FRAMINGHAM EVEN IF THE STATUTE ON WHICH THE CONVICTION IS BASED DOES NOT SPECIFICALLY PROVIDE FOR INCARCERATION AT MCI-FRAMINGHAM.

SENTENCES TO MCI-FRAMINGHAM ARE FOR AN INDEFINITE TERM. ALTHOUGH NO MAXIMUM PERIOD OF INCARCERATION IS STATED BY THE COURT, A FEMALE SENTENCED TO MCI-FRAMINGHAM MAY SERVE UP TO THE MAXIMUM TERM AUTHORIZED BY THE STATUTE DEFINING THE OFFENSE AND WITHIN THE JURISDICTION OF THE COURT.

COMMENTARY

The correctional facilities for the confinement of female prisoners are governed by statute.

> A female, convicted of a crime punishable by imprisonment in a jail or house of correction, may be sentenced to the Massachusetts Correctional Institution, Framingham.

G.L. c. 279, s. 16.

> The sentence to imprisonment of a female convicted of a felony shall be executed in the Massachusetts Correctional Institution, Framingham, or the court imposing sentence in such a case may impose the sentence in a

> jail or house of correction provided by law in the case of male prisoners, if it does not exceed two-and-one-half years.

G.L. c. 279, s. 19.

> All females convicted of crimes in the courts of the Commonwealth and sentenced to imprisonment or otherwise committed to the custody of the department shall be committed to the Massachusetts Correctional Institution, Framingham, or to such other correctional facility or facilities as the commissioner may from time to time designate as appropriate for the purpose.

G.L. c. 125, s. 16.

A defendant who is sentenced by a District Court Judge to MCI-Framingham for an indefinite term may serve a maximum sentence of two-and-one-half years, or the lesser term set by the statute defining the offense. G.L. c. 279, ss. 18, 19. Note that under G.L. c. 279, s. 18, the maximum sentence of a female sentenced to MCI-Framingham for larceny of property of a value not exceeding $100 or adultery or lewd and lascivious cohabitation may not exceed two years.

A Judge may order the sentence of incarceration of a female to a house of correction to be served at MCI-Framingham. G.L. c. 279, ss. 19, 20.

7:09 Conditional Sentencing. (G.L. c. 279, s. 10). "CONDITIONAL SENTENCING" REFERS TO A SPECIFIC TYPE OF DISPOSITION WHERE THE COURT MAY IMPOSE A "FINE OR IMPRISONMENT." SPECIFICALLY, CONDITIONAL SENTENCING IS THE IMPOSITION OF A FINE IN CONJUNCTION WITH A TERM OF IMPRISONMENT, IN WHICH THE SENTENCE OF INCARCERATION IS TO BE SERVED ONLY IF THE FINE IS NOT PAID WITHIN A SPECIFIED PERIOD OF TIME.

COMMENTARY

Conditional sentencing is used infrequently as a form of disposition.

General Laws c. 279, s. 10 provides in relevant part as follows:

> [T]he court may impose upon him a conditional sentence, and order him to pay a fine within a limited time which shall be expressed in the sentence and in default thereof to suffer such imprisonment as is provided by law. He shall be forthwith committed to the custody of an officer in court or to the jail, to be detained until the sentence is complied with; and if he does not within the time limited pay the fine imposed, the sheriff shall cause the other part of the sentence to be executed forthwith.

The "conditional sentence" must be distinguished from two similar techniques. One is where a fine is imposed, with the defendant "to stand committed until it is paid." (G.L. c. 279, s. 1; see Standard 5:00 et seq.). The conditional sentence differs from this in that incarceration is imposed only if the fine is not paid.

The other technique from which conditional sentencing must be distinguished consists of a sentence of fine and imprisonment, not as alternatives, as in a conditional sentence, but rather as two parts of the same disposition (G.L. c. 279, s. 1A; see Standard 6:00). This approach is similar to conditional sentencing in that the sentence of imprisonment can be suspended and later put into effect by revoking suspension upon failure to pay the fine or for any other reason. But see Bearden v. Georgia, 103 S.Ct. 2064 (1983), where the Supreme Court held that upon a defendant's failure to pay a fine or order of restitution imposed as a condition of probation, a Judge may not automatically revoke the defendant's probation but must first make a determination that the defendant did not make "sufficient bona fide efforts to pay" and that "adequate alternative forms of punishment did not exist." Conditional sentencing can be distinguished because it involves neither "suspension" of a sentence of imprisonment nor probation during the period allowed for payment of the fine.

Prior to rendering a conditional sentence, the Judge should ascertain that the defendant is able to pay the fine to be imposed, and should enter on the record, in conjunction with the disposition, a finding of ability to pay. Additionally, the mittimus used in a conditional sentence should reflect the court's decision regarding the defendant's ability to pay the fine.

7:10 Mandatory Sentencing. A MANDATORY SENTENCE IS A SENTENCE OF INCARCERATION WHICH MUST BE IMPOSED IF THE DEFENDANT IS FOUND GUILTY OF THE CRIME CHARGED. UPON FINDING THE DEFENDANT GUILTY, THE JUDGE MUST IMPOSE AT LEAST THE MINIMUM MANDATORY SENTENCE SET FORTH IN THE STATUTE, AND MAY IMPOSE A SENTENCE WHICH EXCEEDS THE MINIMUM MANDATORY SENTENCE UP TO THE MAXIMUM AUTHORIZED BY THE STATUTE, AND WITHIN THE JURISDICTION OF THE COURT.

COMMENTARY

A prosecution commenced under the statutes set forth below must proceed to a finding and, upon entry of a finding of guilty, a sentence must be imposed as prescribed by statute.

Some examples of mandatory sentencing follow:

1. Gun Law. Unlicensed carrying of firearms, G.L. c. 269, s. 10(a); unlicensed possession of a machine gun or unlicensed ownership or possession of a sawed-off shotgun, G.L. c. 269, s. 10(c).

2. Motor Vehicle Fraud. Removing or concealing a motor vehicle with intent to defraud an insurer, G.L. c. 266, s. 27A.

3. Motor Vehicle Theft. Theft of a motor vehicle or receipt of a motor vehicle with knowledge that it was stolen, G.L. c. 266, s. 28(a).

4. False Motor Vehicle Claims. Filing a false claim alleging the theft or conversion of a motor vehicle to a police department or Registry of Motor Vehicles, G.L. c. 266, s. 29.

5. Operation after Revocation of License. G.L. c. 90, s. 23.

6. Driving Under the Influence of Intoxicating Liquor or Drugs. G.L. c. 90, s. 24(1)(a)(1). But see G.L. c. 90, s. 24D, wherein it is provided that the case of a defendant charged with operating a motor vehicle while under the influence of intoxicating liquor may be continued without a finding, subject to the conditions established in G.L. c. 90, s. 24D, as long as no serious personal injury to another person or death occurred and the defendant had not committed a prior offense within the preceding six years.

7. Motor Vehicle Homicide. G.L. c. 90, s. 24G(a).

8. Crimes Against the Elderly. Assault and battery by means of a dangerous weapon upon a person sixty-five years or older, G.L. c. 265, s. 15A; assault by means of a dangerous weapon upon a person sixty-five years or older, G.L. c. 265, s. 15B; larceny against a person sixty-five years or older, G.L. c. 266, s. 25.

The above is not meant to be an exhaustive list of mandatory sentencing provisions. Regular review of new legislation on this subject is recommended.

7:11 Stay of Execution of Sentence; Deferred Sentencing.

"STAY OF EXECUTION OF SENTENCE" SHOULD BE DISTINGUISHED FROM "DEFERRED SENTENCING."

IN A STAY OF EXECUTION OF SENTENCE, THE JUDGE IMPOSES A SENTENCE OF INCARCERATION AND STAYS THE EXECUTION THEREOF IN ORDER TO PERMIT THE DEFENDANT TO ATTEND TO PERSONAL CONCERNS, SUCH AS FAMILY, EMPLOYMENT OR FINANCIAL MATTERS.

IN DEFERRED SENTENCING, THE JUDGE ENTERS A FINDING OF GUILTY AND DEFERS IMPOSITION OF SENTENCE, USUALLY TO OBTAIN FURTHER INFORMATION, SUCH AS A PRESENTENCE REPORT.

A STAY IS SOMETIMES ALSO USED AFTER PROBATION REVOCATION TO PROVIDE THE DEFENDANT WITH A FINAL OPPORTUNITY TO COMPLY WITH PROBATIONARY TERMS.

COMMENTARY

No statute prohibits a Judge from deferring the imposition of a sentence or staying the execution of a sentence. The inherent powers of the court appear to support these procedures. A defendant who requests the court to stay the execution of the sentence should be required to demonstrate that immediate incarceration would work an undue hardship on the defendant or his or her family.

If a stay of execution of sentence is granted, the Judge should indicate the date on which execution of the sentence is to begin. When the Judge defers the imposition of a sentence, the case should be continued for disposition. In either event, the defendant should be instructed to report to the court on the specified date when either the defendant's sentence will be imposed or the execution thereof will commence.

The Judge should consider the inherent danger of flight in deciding whether to allow a deferred sentence or a stay of execution of sentence. The Judge also should consider imposing conditions, including appropriate recognizance, that will reduce the danger of flight. A defendant who fails "without sufficient excuse" to appear in court at the specified time may be punished for a separate offense under G.L. c. 276, s. 82A. Sclamo v. Comm., 352 Mass. 576, 227 N.E.2d 518 (1967).

Where sentencing is deferred, an appeal of the guilty finding must be taken immediately upon the entry of the finding. Dist. Ct. Supp. R. Crim. P. 7. See Younker v. District Court of Natick, 374 Mass. 31, 370 N.E.2d 1374 (1977). Where the execution of sentence is stayed, the appeal must be taken upon imposition of the sentence. Dist. Ct. Supp. R. Crim. P. 7; Younker, supra. The stay of execution of sentence does not extend the period of time for appeal.

7:12 Custom and Usage Sentencing. (G.L. c. 279, s. 5).

IF NO PUNISHMENT FOR A CRIME IS PROVIDED BY STATUTE, A JUDGE SHOULD IMPOSE A SENTENCE OF A FINE OR IMPRISONMENT WHICH CONFORMS TO THE "COMMON USAGE AND PRACTICE IN THE COMMONWEALTH." UNLESS OTHERWISE PROVIDED, A DEFENDANT CONVICTED OF A MISDEMEANOR PUNISHABLE BY IMPRISONMENT MAY BE SENTENCED EITHER TO A JAIL OR HOUSE OF CORRECTION.

COMMENTARY

Generally, the definition of crimes and the establishment of penalties therefor are legislative functions. However, when a statute fails to include a penalty for its violation, or the offense is a common law crime, a Judge is still required, upon conviction, to impose a sentence. G.L. c. 279, s. 5.

Misdemeanors, such as affray and resisting lawful arrest, are common law crimes for which there are no statutory references, Comm. v. Macomber, 3 Mass. 254 (1807). In such circumstances, the Judge imposing the sentence is bound by the jurisdictional authority of the District Court to sentence a defendant for a period not exceeding two-and-one-half years for each offense. See G.L. c. 279, ss. 18, 19, 23.

7:13 Deduction of Time Already Served. (G.L. c. 127, s. 129B; G.L. c. 279, s. 33A). A DEFENDANT WHO HAS BEEN HELD IN CUSTODY UNDER ARREST, OR IN A JAIL OR HOUSE OF CORRECTION, OR UNDER COMMITMENT TO A MENTAL INSTITUTION, PRIOR TO THE IMPOSITION OF A SENTENCE OF INCARCERATION, IS ENTITLED TO RECEIVE CREDIT FOR THE NUMBER OF DAYS SPENT IN CONFINEMENT AWAITING TRIAL.

COMMENTARY

General Laws c. 127, s. 129B provides as follows:

> The sentence of any prisoner in any correctional institution of the commonwealth or in any house of correction or jail, who was held in custody awaiting trial shall be reduced by the number of days spent by him in confinement prior to such sentence and while awaiting trial, unless the court in imposing such sentence had already deducted therefrom the time during which such prisoner had been confined while awaiting trial.

(Emphasis added).

General Laws c. 279, s. 33A provides as follows:

> The court on imposing a sentence of commitment to a correctional institution of the commonwealth, a house of correction, or a jail, shall order that the prisoner be deemed to have served a portion of said sentence, such portion to be the number of days spent by the prisoner in confinement prior to such sentence awaiting and during trial.

(Emphasis added).

Any time spent in jail prior to sentencing by a defendant charged with the offense for which he is ultimately convicted, or an offense which arises out of the same occurrence and of which he is acquitted, should be credited against the order of commitment. Comm. v. Grant, 366 Mass. 262, 317 N.E.2d 484 (1974).

A defendant should receive credit for the number of days spent in custody under arrest, under commitment to a mental institution or in a jail, prior to the imposition of a sentence of incarceration for the crime charged. Libby v. Commissioner of Correction, 353 Mass. 472, 233 N.E.2d 200 (1968); In re Stearns, 343 Mass. 53, 175 N.E.2d 470 (1961); and Comm. v. Aquafresca, 11 Mass. App. Ct. 975, 417 N.E.2d 1224 (1981).

A defendant who is incarcerated pursuant to a sentence for an unrelated crime is not deemed to have spent time "in confinement" pending trial on a new complaint and thus is not permitted to deduct the number of days confined pending trial or on a subsequent sentence. See In Re Needel, 344 Mass. 260, 182 N.E.2d 125 (1962). However, where a defendant served time on a sentence that was vacated and then was sentenced on an unrelated crime, the Court held that the defendant was entitled to credit for the time served on the sentence that was invalidated. Manning v. Superintendent, 372 Mass. 387, 361 N.E.2d 1299 (1977). Likewise, a defendant should receive credit for time served on an unrelated offense that resulted in an acquittal or was nol prossed. Comm. v. Foley, 17 Mass. App. Ct. 238, 242-44, 457 N.E.2d 654, 657-58 (1983).

> Whenever a defendant has served a portion of a sentence on a conviction which has been reversed and he is resentenced, the judge should take care to have the record disclose what consideration has been given to the time already served. This is even more important when other sentences have been imposed subsequent to the one which has been reversed. . . .

Manning, supra at 395.

If the mittimus is silent as to whether the Judge deducted time spent in confinement from the sentence imposed, the defendant may receive credit from the correction authorities for the time spent in confinement. Manning, supra. See also Brown v. Commissioner, 336 Mass. 718, 147 N.E.2d 782 (1957). Cf. North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072 (1969).

If a defendant is returned to prison as a result of a parole violation consisting of his or her arrest for an offense committed while on parole, the confinement of the defendant from the time of return to the time of sentencing for the later offense is not time spent "in confinement," and therefore the defendant is not entitled to credit under G.L. c. 127, s. 129B or G.L. c. 279, s. 33A. Harkey v. Superintendent, 356 Mass. 722, 252 N.E.2d 35 (1969).

See Standard 7:14 on preparation of the mittimus.

7:14 Preparation and Execution of Mittimus. THE WARRANT FOR THE COMMITMENT OF A DEFENDANT SENTENCED BY A DISTRICT COURT JUDGE (THE MITTIMUS) SHOULD CONTAIN: (1) THE STATUTORY NAME OF THE CRIME OF WHICH THE DEFENDANT WAS CONVICTED; (2) A CITATION OF THE STATUTE UNDER WHICH THE COMPLAINT WAS DRAWN; (3) THE DURATION OF THE SENTENCE OF INCARCERATION; AND (4) THE PLACE OF CONFINEMENT. G.L. c. 279, s. 37.

THE WARRANT FOR THE COMMITMENT OF A DEFENDANT HELD ON BAIL ON APPEAL OR ON A BIND-OVER TO THE SUPERIOR COURT (THE MITTIMUS) SHOULD CONTAIN: THE INFORMATION IN NUMBERS (1) and (2) ABOVE; A COPY OF THE COMPLAINT; THE AMOUNT OF BAIL; THE REASONS FOR BAIL; THE PROBATION OFFICER'S REPORT; AND THE DATE OF THE DEFENDANT'S RETURN TO COURT.

A COURT OFFICER, SHERIFF, DEPUTY SHERIFF, PROBATION OFFICER OR CONSTABLE IS AUTHORIZED TO SERVE THE MITTIMUS, EVEN IF THE PENAL INSTITUTION NAMED IN THE MITTIMUS IS NOT LOCATED IN THE COUNTY OF THE EXECUTING OFFICER.

COMMENTARY

Proper preparation of the mittimus is essential, as this is the official record of the defendant's confinement order. A copy of the complaint on which an MCI-Concord or MCI-Framingham sentence has been imposed must accompany the mittimus in all cases. District Court Bulletin No. 2-73, Item 5 (February 12, 1973).

The order of the sentences contained in the mittimus is determinative. A defendant committed on two or more sentences serves them in the order stated in the mittimus. G.L. c. 279, s. 8. When sentences of a fine and imprisonment are stated in the mittimus, the defendant is committed on the term sentence first. G. L. c. 279, s. 8. If a defendant is committed on the portion of a "split sentence" that was originally suspended, the mittimus must indicate this fact and the full length of the total original sentence. Hennessey v. Superintendent, 386 Mass. 848, 438 N.E.2d 329 (1982); District Court Bulletin No. 1-83, Item 26 (February 18, 1983).

To insure that a defendant properly receives credit for time served in confinement, the following procedure is recommended:

1. In preparing the mittimus, the Clerk-Magistrate should make inquiry, or cause inquiry to be made, to determine whether the defendant was confined awaiting trial and, if so, the number of days of confinement.

2. If the defendant was confined awaiting trial, the following statement should appear on the mittimus: "It is further ordered that the defendant receive credit of ____ days confined awaiting trial." In this way there will be no ambiguity as to whether the defendant received credit for time spent in confinement. See Manning v. Superintendent, 372 Mass. 387, 361 N.E.2d 1299 (1977), and Standard 7:13.

Court officers, sheriffs, deputy sheriffs, probation officers, and constables are authorized to serve a mittimus. G.L. c. 279, s. 38; G.L. c. 218, s. 61. The officer serving the mittimus should leave an attested copy of the precept, with the return noted thereon, with the superintendent, jailer or keeper of the prison, and should return the mittimus to the court or magistrate issuing it. G.L. c. 279, s. 39; G.L. c. 218, s. 37.

If a prisoner is subsequently sentenced to confinement in a place other than where he or she is currently held, the mittimus should be placed in the hands of the superintendent or keeper of the prison where the prisoner is presently held. G.L. c. 279, s. 40.

A sample mittimus, now coming into broad use in the District Court as part of the implementation of the SYSTEMATIC case processing system, follows:

MITTIMUS Order of Commitment ☐ **ADULT** ☐ **JUVENILE**	COURT DIVISION	**Trial Court of Massachusetts District Court Department**
NAME, ADDRESS AND DOB OF DEFENDANT DOB:	DOCKET NUMBER(S)	OFFENSE(S) (Include Chap. and Sec. of G.L.)

WHEREAS THE ABOVE NAMED DEFENDANT HAS ON THIS DATE OF ISSUE BEEN BEFORE THIS DISTRICT COURT ON A COMPLAINT ALLEGING THE OFFENSE(S) LISTED ABOVE:

- ☐ The court finds there is just cause to hold the defendant because the accused is unable or unwilling to recognize for his next court appearance in the amount ordered by the court; and
- ☐ It is adjudged that the defendant is guilty of the offense(s) as shown above and convicted; and
- ☐ It is adjudged that the defendant is found delinquent of the offenses as shown above; and
- ☐ Other (specify):

IT IS THEREFORE ORDERED THAT THE DEFENDANT BE COMMITTED TO THE:

☐ _____ County Jail/House of Correction
☐ Department of Youth Services at _____
} in lieu of $_____ bail and there await his next court appearance at the

A. ☐ _____ District Court on _____ (DATE) at _____ (TIME)

B. ☐ _____ District Court jury session on _____ (DATE) at _____ (TIME)

C. ☐ Superior Court next to be holden at _____ County.

☐ _____ County Jail/House of Correction **and confined there for a period of** _____

☐ Massachusetts Correctional Institution at _____ **and confined there for a period of** _____

☐ Department of Youth Services at _____ **for a period of** _____

It is further ordered that the defendant receive credit of _____ days confined awaiting trial.

Other and further orders of this court:

TO ANY OFFICER AUTHORIZED TO SERVE CRIMINAL PROCESS:

WE COMMAND YOU THEREFORE to convey the said defendant safely to said place of confinement and deliver him to the keeper thereof; and the said keeper is commanded to receive the said defendant into his custody and keep him safely until he is brought before the court, serves his sentence, posts bail as ordered or otherwise is legally discharged.

WITNESS: FIRST JUSTICE	DATE OF ISSUE	CLERK-MAGISTRATE/ASST. CLERK X

RETURN OF SERVICE — RECEIPT OF RECEIVING OFFICIAL

The person making service, named below, has conveyed the defendant to the above named institution and has left with the keeper thereof a copy of this order with the return thereon; and the receiving official, named below, has received said defendant.

DATE OF SERVICE	TIME OF SERVICE	SIGNATURE OF PERSON MAKING SERVICE X	SIGNATURE OF RECEIVING OFFICIAL X

MODIFYING THE ORIGINAL DISPOSITION

8:00 Motion to Revise or Revoke Sentence
8:01 Motion for New Trial
8:02 Motion Procedure

8:00 Motion to Revise or Revoke Sentence. THE AUTHORITY TO REVISE OR REVOKE A SENTENCE IS GOVERNED BY RULE 29(a) OF THE MASSACHUSETTS RULES OF CRIMINAL PROCEDURE. A FINDING OF GUILTY CANNOT BE REVOKED. ONLY THE SENTENCE ORIGINALLY IMPOSED CAN BE REVISED OR REVOKED.

COMMENTARY

Mass. R. Crim. P. 29(a) provides as follows:

> The trial judge upon his own motion or the written motion of a defendant filed within sixty days after the imposition of a sentence, within sixty days after receipt by the trial court of a rescript issued upon affirmance of the judgment or dismissal of the appeal, or within sixty days after entry of any order or judgment of an appellate court denying review of, or having the effect of upholding, a judgment of conviction, may, upon such terms and conditions as he shall order, revise or revoke such sentence if it appears that justice may not have been done.

The rule requires a defendant who seeks to have his or her sentence revised or revoked by the court to file both a written motion and an affidavit in support of the motion with the court within sixty days after imposition of the sentence, and to serve the prosecutor with a copy of the motion and affidavit. The Judge may revise or revoke the sentence originally imposed, but the finding of guilty must stand. See Standard 8:02 regarding the hearing on the motion.

The Judge or the Clerk-Magistrate in the primary court should not accept a motion to revise or revoke a sentence more than sixty days after imposition of the original sentence; or, if appeal for trial de novo has been claimed, unless and until a proper withdrawal of appeal is made.

The sixty day period imposed by the rule is absolute. The Judge lacks the authority to extend the time within which the motion must be filed by the defendant. District Court Bulletin No. 2-78, Item 26 (May 2, 1978). According to the commentary to Rule 29(a), a Judge who elects sua sponte to reduce the original sentence imposed, must act within sixty days of imposition of the sentence. Comm. v. Burrone, 347 Mass. 451, 198 N.E.2d 407 (1964). In making this determination, the Judge may not consider events occurring after the original imposition of sentence. Comm. v. Sitko, 372 Mass. 305, 361 N.E.2d 1258 (1977).

The sixty day period commences on the date the original sentence is imposed. Therefore, a motion to revise or revoke a sentence must be filed within sixty days of imposition of the sentence in the primary court, or, if an appeal is taken, within sixty days of imposition of the sentence in the jury session.

A motion to revise or revoke a sentence filed more than sixty days after its imposition cannot be entertained at a probation revocation hearing.

Upon a claim of appeal from a District Court bench trial to a jury session, the Judge who imposed the original sentence is divested of the power to revise or revoke the sentence. However, if the appeal is properly withdrawn and the motion to revise or revoke sentence is filed within sixty days of the original sentence, the Judge who imposed the original sentence may revise or revoke the sentence. See also Standard 8:02.

If the motion is filed within the requisite sixty day period, the Judge may act on the motion at any time. But see Comm. v. Layne, 386 Mass. 291, 435 N.E.2d 356 (1982). Even if the defendant has commenced serving a sentence, the sentence may be reduced pursuant to this rule, District Attorney for the Northern District v. Superior Court, 342 Mass. 119, 172 N.E.2d 245 (1961), and may be increased in duration, Aldoupolis v. Comm., 386 Mass. 260, 435 N.E.2d 350 (1982); United States v. DiFrancesco, 449 U.S. 117, 101 S.Ct. 426 (1980).

The granting or denial of a motion filed under Rule 29 is a matter of discretion with the Judge. The defendant must establish by the motion and supporting affidavits the means by which "justice may not have been done," as the rule authorizes

a motion to revise or revoke a sentence to be determined on the basis of these documents, without oral argument.

The office of the Commissioner of Probation should be advised of all cases in which a motion to revise or revoke a sentence is granted. District Court Bulletin No. 2-80, Item 17 (July 3, 1980).

8:01 Motion for New Trial. AUTHORITY TO ENTERTAIN A MOTION FOR A NEW TRIAL IS GOVERNED BY RULE 30(b) OF THE MASSACHUSETTS RULES OF CRIMINAL PROCEDURE. ONCE APPEAL FOR TRIAL DE NOVO HAS BEEN CLAIMED, SUCH MOTION SHOULD NOT BE ACCEPTED BY THE JUDGE OR THE CLERK-MAGISTRATE UNLESS AND UNTIL A PROPER WITHDRAWAL OF APPEAL IS MADE, SINCE THE CASE IS NO LONGER IN THE PRIMARY COURT.

COMMENTARY

Mass. R. Crim. P. 30(b) provides as follows:

> The trial judge upon motion in writing may grant a new trial at any time if it appears that justice may not have been done. Upon the motion the trial judge shall make such findings of fact as are necessary to resolve the defendant's allegations of error of law.

Rule 30(c)(3) requires each moving party to file and serve affidavits, where appropriate, in support of the allegations made in the motion.

In determining whether a new trial should be granted, a Judge must apply the standard of whether or not "justice may not have been done." If the issue raised by the motion could have been raised at trial, the Judge should exercise this power sparingly. Comm. v. Harrington, 379 Mass. 446, 399 N.E.2d 475 (1980).

The discretion, with respect to granting or denying a new trial, of a motion judge is very broad. See Commonwealth v. Markham, 10 Mass. App. Ct. 651-52, 411 N.E.2d 494, 495 (1980). If the motion judge applies the appropriate standards, the instances in which the Judge will be reversed are extremely rare. Obviously, a reversal involves essentially concluding

that there has been an abuse of discretion, although the decision upon that issue is subject to appellate review. Commonwealth v. Woods, 382 Mass. 1, 8, 413 N.E.2d 1099, 1103 (1980); Comm. v. Johnson, 13 Mass. App. Ct. 10, 429 N.E.2d 726 (1981). See Blaikie v. District Atty. for the Suffolk Dist., 375 Mass. 613, 618-619, 378 N.E.2d 1368, 371-72 (1978).

A motion for a new trial may be based on newly-discovered evidence, or errors of law. Comm. v. Dascalakis, 246 Mass. 12, 140 N.E. 470 (1923).

The granting of a new trial upon the introduction of newly-discovered evidence is discretionary with the trial Judge. Davis v. Boston Elev. Ry., 235 Mass. 482, 126 N.E. 841 (1920).

> It is not the Judge's conclusion as to the guilt or innocence of the defendant which determines the decision on a motion for a new trial; rather the question before the judge is whether the new evidence offered creates a substantial risk that a jury exposed to that evidence would have reached a different conclusion. . . .

Comm. v. Markham, 10 Mass. App. Ct. 651, 654, 411 N.E.2d 494, 496 (1981).

> It is enough if the newly discovered evidence appears to be so grave, material and relevant as to afford a probability that it would be a real factor with the . . . [trier of fact], in reaching a decision. The motion ought not be granted except upon proof of important evidence of such a nature as presumably would have genuine effect. . . .

Davis, supra at 496.

Even though newly produced evidence might, if presented, have influenced the trier of fact to reach a different result, this does not compel the granting of the motion. Comm. v. Brown, 378 Mass. 165, 390 N.E.2d 1107 (1979); Comm. v. DeChristoforo, 360 Mass. 531, 277 N.E.2d 100 (1971). The evidence must have been unknown and unavailable during trial. Comm. v. Kelley, 370 Mass. 147, 346 N.E.2d 368 (1976). A

failure of the prosecution to disclose material, exculpatory evidence warrants a new trial. Comm. v. Collins, 386 Mass. 1, 434 N.E.2d 964 (1982).

Overwhelming independent evidence of guilt may make the introduction of newly-discovered evidence insufficient grounds for a new trial. Comm. v. Graves, 363 Mass. 863, 299 N.E.2d 711 (1973).

Failure of a trial Judge to deliver the colloquy required by Mass. R. Crim. P. 12(c)(3)(A) upon a defendant who enters a guilty plea may be grounds for a new trial. Comm. v. Nolan, 16 Mass. App. Ct. 994, 454 N.E.2d 1280 (1983) (rescript).

It is prudent to make written findings of fact in disposing of all motions for a new trial. Under Rule 30(b), a Judge is only required to "make such findings of fact as are necessary to resolve the defendant's allegations of error of law" (e.g. lack of subject matter jurisdiction, improper denial of requests for rulings of law).

Upon claim of appeal from a District Court bench trial to a jury session, the Judge who imposed the original sentence or other disposition should not consider a motion for a new trial unless the appeal is properly withdrawn. If the appeal is properly withdrawn, the motion for a new trial should be acted on by the Judge who originally imposed the sentence or other disposition. Mass. R. Crim. P. 30(c)(7). See Standard 8:02.

8:02 Motion Procedure. A MOTION TO REVISE OR REVOKE A SENTENCE WHICH IS FILED IN THE PRIMARY COURT SHOULD BE HEARD BY THE JUDGE WHO ORIGINALLY IMPOSED THE SENTENCE. A MOTION FOR A NEW TRIAL SHOULD BE HEARD BY THE JUDGE WHO PRESIDED AT THE TRIAL.

THE JUDGE SHOULD BE INFORMED OF THE MOTION, AND THE HEARING, IF ANY, SHOULD BE HELD AT THE TIME AND PLACE DESIGNATED BY THE JUDGE.

IF THE JUDGE WHO PRESIDED AT THE TRIAL OR WHO IMPOSED THE SENTENCE IS NO LONGER AVAILABLE DUE TO DEATH, PROLONGED ILLNESS, RETIREMENT, REMOVAL OR RESIGNATION, THE MOTION SHOULD BE FILED IN THE COURT WHERE THE COMPLAINT WAS ORIGINALLY FILED. THE PRESIDING JUSTICE OF THAT COURT SHOULD CONFER WITH THE CHIEF JUSTICE OF THE DISTRICT COURT FOR ASSIGNMENT OF ANOTHER JUDGE TO HEAR THE MATTER.

COMMENTARY

Mass. R. Crim. P. 29(d) provides:

> A motion filed pursuant to this rule [revision or revocation of sentence] may be heard by the trial judge wherever he is then sitting.

Mass. R. Crim. P. 30(c)(7) provides:

> All motions under subdivision . . . (b) of this rule [new trial] may be heard by the trial judge wherever he is then sitting.

It is not necessary for a Judge to conduct a hearing on a motion to revise or revoke a sentence if he or she intends to deny the motion, but it is preferable for a Judge to hold a hearing on such a motion if he or she intends to allow it. District Court Bulletin No. 2-80, Item 17(b) (July 3, 1980). Although it has been held that a Judge may decide a motion for a new trial on the basis of affidavits without further hearing "if no substantial issue is raised by the motion or affidavits," Mass. R. Crim. P. 30(c)(3); Comm. v. Saarela, 15 Mass. App. Ct. 403, 406, 446 N.E.2d 97, 99 (1983) (quoting from Comm. v. Stewart, 383 Mass. 253, 257, 418 N.E.2d 1219, 1222 (1981)), it is better practice to conduct a hearing on a motion for a new trial.

A motion to revise or revoke a sentence which is filed in the primary court should be heard by the Judge who imposed the original sentence and should not be heard by any other Judge unless the Judge who imposed the original sentence or other disposition is unavailable due to death, prolonged illness, retirement, removal or resignation.

Similarly, a motion for a new trial should be heard by the Judge who presided at the trial and should not be heard by any other Judge unless the Judge who presided at the trial is unavailable due to death, prolonged illness, retirement, removal or resignation.

MISCELLANEOUS

9:00 Peace Bonds
9:01 Pleas of Guilty or Nolo Contendere
9:02 Filing of Complaint as Disposition; Bringing Forward and Disposition of a Filed Complaint
9:03 Costs and Other Assessments
9:04 Restitution
9:05 Victim's Opportunity to be Heard
9:06 Sealing of Records
9:07 Rendition
9:08 Double Jeopardy
9:09 Attempts

9:00 Peace Bonds. (G.L. c. 218, s. 28; G.L. c. 275, ss. 4 and 14). "PEACE BONDS," REQUIRING SECURITY AGAINST FUTURE BREACHES OF THE PEACE, ARE APPROPRIATE IN SITUATIONS WHERE THERE IS A CONTINUING OR IMMINENTLY THREATENED CRIME OR BREACH OF THE PEACE.

COMMENTARY

The statutes provide for peace bonds either as an additional punishment upon the conviction of a separate offense, or where there is no other conviction but there is "just cause to fear that the defendant will commit a crime." G.L. c. 275, s. 6.

1. Separate Conviction (G.L. c. 218, s. 28). The District Court is granted authority to issue peace bonds for one year as a punishment in addition to that imposed for a violation of any statute within the jurisdiction of the District Court, with exceptions noted below.

> District courts may require persons found guilty of any crime within their final jurisdiction, except a violation of by-laws, orders, ordinances, rules and regulations, made by cities, towns and public officers, or of the laws and regulations relative to the public health or relative to defective highways, in addition to the punishment prescribed by law, to recognize with sureties, in a reasonable sum, to keep the peace or be of good behavior, or both, for not more than one year, and to stand committed until they so recognize. Sections thirteen, sixteen and seventeen of chapter two hundred and seventy-five shall apply to recognizances so taken.

G.L. c. 218, s. 28.

2. (a) Threat to Commit a Crime (G.L. c. 275, s. 4). A defendant who has "threatened to commit a crime against the

person or property of another," as an alternative to a fine or sentence of imprisonment, may be ordered, upon conviction,

> to enter into a recognizance with sufficient sureties, in such sum as the court or justice orders, to keep the peace toward all the people of the commonwealth, and especially toward the person requiring such security for such term, not exceeding six months . . . .

G.L. c. 275, s. 4.

A defendant who fails to recognize shall be committed to a jail or house of correction during the period for which the defendant was required to give security. G.L. c. 275, s. 5. In addition to the peace bond, the defendant may be ordered to pay the expenses of the prosecution. G.L. c. 275, s. 7. A defendant aggrieved by an order of a District Court Judge to recognize may, upon giving the required security, appeal to the Superior Court. G.L. c. 275, s. 8.

Upon examination, it must be found that there is "just cause to fear that such crime will be committed by the person complained of." G.L. c. 275, s. 6. The constitutionality of G.L. c. 275, ss. 2 and 6 was challenged on the grounds of vagueness and was upheld in Robinson v. Bradley, 300 F. Supp. 665 (D. Mass. 1969). To find "just cause to fear that such crime will be committed by the person complained of, there must be an intention and an ability which would justify apprehension by the recipient in the circumstances." Robinson, supra.

(b) Threat or Affray (G.L. c. 275, s. 14). A defendant who causes an affray in the presence of a Judge or who threatens to kill or harm another person

> may be ordered, without process or any other proof, to recognize to keep the peace or be of good behavior for not more than three months, and in case of refusal may be committed as provided in section five [of Chapter 275].

G.L. c. 275, s. 14.

A defendant should be afforded a hearing to ascertain whether he or she has violated a term of the peace bond, and if a violation is found, the defendant will forfeit the bond.

See the following sample peace bond.

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT

PEACE BOND

We, _____ as principal and the _____, a corporation
[defendant] [surety]
duly organized under the laws of the State of _____
and having a usual place of business in _____, Massachusetts, as surety, jointly and severally acknowledge that we and our personal representatives are bound unto the Commonwealth of Massachusetts in the sum of _____ _____ dollars ($) if default be made in performance of the condition here underwritten.

The above-named defendant, having been charged with the crime of _____ _____, and the Court having found sufficient evidence to warrant a finding of guilty, the Court has ordered in addition to the sentence (or in lieu of sentencing pursuant to G.L. c. 275, ss. 4 or 14) that the defendant recognize (personally or with surety) in the sum of_____ _____ dollars ($), to the use of the said Commonwealth if default be made in the performance of the condition here underwritten.

The condition of the above recognizance is such that, if the above-named defendant keeps the peace toward all the people of the Commonwealth (and especially toward _____), for not less than *_____ months, the recognizance shall be returned.

In the case of non-performance of the condition of recognizance, the sum of the recognizance shall be paid to the Commonwealth.

IN WITNESS WHEREOF, said principal and surety hereunto set their hands and seals this _____ day of _____, 198___.

_____ _____
Principal Address

_____ _____
Surety Address

The above is approved by me.

_____ _____
Justice Division

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* Not to exceed one year or, if pursuant to G.L. c. 275, s. 4, six months, or, if pursuant to G.L. c. 275, s. 14, three months.

9:01 Pleas of Guilty or Nolo Contendere. RULE 12 OF THE MASSACHUSETTS RULES OF CRIMINAL PROCEDURE GOVERNS THE ENTRY AND WITHDRAWAL OF PLEAS OF GUILTY OR NOLO CONTENDERE.

WHERE THE STATUTE AUTHORIZES INCARCERATION AS A DISPOSITION FOR THE OFFENSE, THE RECOMMENDED PRACTICE IS FOR THE COURT TO ENTER A PLEA OF NOT GUILTY.

ABSENT SPECIAL CIRCUMSTANCES, THE COURT SHOULD NOT ACCEPT A PLEA OF NOLO CONTENDERE.

IN THOSE CASES IN WHICH A PLEA OF GUILTY OR NOLO CONTENDERE IS ACCEPTED, THE JUDGE MUST AFFORD THE DEFENDANT THE INSTRUCTIONS AND PROCEDURAL SAFEGUARDS SET FORTH IN MASSACHUSETTS RULE OF CRIMINAL PROCEDURE 12(c), AND ANY OTHER RELEVANT STATUTORY OR CONSTITUTIONAL SAFEGUARDS.

COMMENTARY

Pleas of not guilty, or guilty, or, with the consent of the Judge, nolo contendere, may be made to any crime with which a defendant has been charged and over which the court has jurisdiction. If a defendant refuses to plead or if the Judge refuses to accept a plea of guilty or nolo contendere, a not guilty plea should be entered. Mass. R. Crim. P. 12(a)(1).

A plea of guilty is valid only if the defendant has waived counsel or is represented by counsel. White v. Maryland, 373 U.S. 59, 83 S.Ct. 1050 (1963); Moore v. Michigan, 355 U.S. 155, 78 S.Ct. 191 (1957). A defendant who wishes to plead guilty or nolo contendere must do it himself or herself except where otherwise permitted by statute or rule of court. Mass. R. Crim. P. 12(a)(1).

Unlike a plea of guilty, a plea of nolo contendere requires the consent of the Judge. Additionally, entry of the "nolo" plea cannot be introduced in evidence at a subsequent trial. Comm. v. Tilton, 49 Mass. (8 Metcalf) 232 (1844). A defendant may not have his or her credibility as a witness in a subsequent case impeached by a plea of nolo or a disposition imposed subsequent to a nolo plea. Olszewski v. Goldberg, 223 Mass. 27, 111 N.E. 404 (1916). "It is an implied confession of guilty only, and cannot be used against the defendant as an admission in any civil suit for the same act." Comm. v. Ingersoll, 145 Mass. 381, 14 N.E. 449 (1888); Comm. v. Horton, 26 Mass. (9 Pickering) 206 (1829). However, acceptance of a plea of nolo contendere is equivalent to a plea of guilty for the purpose of disposition of the case at issue. Olszewski v. Goldberg, supra; United States v. American Bakeries, 284 F. Supp. 864 (W.D. Mich. 1968).

Rule 12(c) of the Mass. R. Crim. P. establishes the following procedure for pleas of guilty or nolo contendere:

> After being informed that the defendant intends to plead guilty or nolo contendere:
>
> (1) Inquiry. The judge shall inquire of the defendant or his counsel as to the existence of and shall be informed of the substance of any agreements that are made which are contingent upon the plea.
>
> (2) Recommendation as to Sentence. If there were sentence recommendations contingent upon the tender of the plea the judge shall either:
>
> (A) inform the defendant that he will not impose a sentence that exceeds the terms of the recommendation without first giving the defendant the right to withdraw his plea; or
>
> (B) inform the defendant that he does not intend to be restricted in any way by the recommendation agreement and may impose any sentence provided for by the General Laws. If the defendant thereafter pleads guilty he shall not be entitled to withdraw that plea except in the discretion of the judge.

(3) Notice of Consequences of Plea. The judge shall inform the defendant, or permit defense counsel under the direction of the judge to inform the defendant, on the record, in open court:

(A) that by his plea of guilty or nolo contendere he waives his right to trial with or without a jury, his right to confrontation of witnesses, and his privilege against self-incrimination;

(B) where appropriate, of the maximum possible sentence on the charge, including that possible from consecutive sentences; of any different or additional punishment based upon second offense or sexually dangerous persons provisions of the General Laws, if applicable; and of the mandatory minimum sentence, if any, on the charge.

(4) Tender of Plea. The defendant's plea shall then be tendered to the court.

(5) Hearing on Plea; Acceptance. The judge shall conduct a hearing to determine the voluntariness of the plea and the factual basis of the charge.

(A) Factual Basis for Charge. A judge shall not accept a plea of guilty unless he is satisfied that there is a factual basis for the charge. The failure of the defendant to acknowledge all of the elements of the factual basis shall not preclude a judge from accepting a guilty plea. Upon a showing of cause the tender of the guilty plea and the acknowledgement of the factual basis of the charge may be made on the record at the bench.

(B) Acceptance. At the conclusion of the hearing the judge shall state his acceptance or rejection of the plea.

(C) Sentencing. After acceptance of a plea of guilty or nolo contendere, the judge may proceed with sentencing.

> (6) Refusal to Accept an Agreed Sentence Recommendation. If the judge determines that he will impose a sentence that will exceed an agreed recommendation for a particular sentence or type of punishment under subdivision (b)(1)(C) of this rule or an agreed recommendation for a particular disposition other than incarceration under subdivision (b)(1)(E), after having informed the defendant as provided in subdivision (c)(2)(A) that he would not do so, he shall, on the record, advise the defendant personally in open court or on a showing of cause, in camera, that he intends to exceed the terms of the plea recommendation and shall afford the defendant the opportunity to then withdraw his plea. The judge may indicate to the parties what sentence he would impose.

If the Judge is advised that an admission of sufficient facts is to be made, the Judge should inquire as to whether there is an agreed recommendation and then should proceed under Mass. R. Crim. P. 12(c)(2)(A) or (B). Comm. v. Duquette, 386 Mass. 834, 438 N.E.2d 334 (1982). See Standard 3:00. See Blaikie v. District Attorney for Suffolk County, 375 Mass. 613, 378 N.E.2d 1368 (1978), and Comm. v. Tirrell, 382 Mass. 502, 416 N.E.2d 1357 (1981), for a discussion of guilty pleas entered in conjunction with "agreements" with the prosecution and attempts to either specifically enforce the agreement or to withdraw a guilty plea. See also Standards 4:00-4:03 of the District Court Standards of Judicial Practice: Arraignment (August 31, 1977) on pleas and the withdrawal of pleas.

A Judge should not accept a plea of guilty or nolo contendere unless the defendant is advised of the following:

> If you are not a citizen of the United States, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization, pursuant to the laws of the United States.

G.L. c. 278, s. 29D.

If the Judge fails to so advise the defendant and the defendant later demonstrates that his or her plea and conviction may have one of these consequences, the Judge must vacate the judgment and permit the defendant to withdraw the plea and enter a "not guilty" plea. The fact that the defendant was so advised must be noted on the record, as the defendant is presumed not to have received the information unless it is properly documented. G.L. c. 278, s. 29D.

9:02 Filing of Complaint as Disposition; Bringing Forward and Disposition of a Filed Complaint. (G.L. c. 218, s. 38). UNLESS PROHIBITED BY STATUTE, THE COURT MAY FILE A COMPLAINT OVER WHICH IT HAS FINAL JURISDICTION, EXCEPT FELONY COMPLAINTS WHERE THE ACCUSED PREVIOUSLY HAS BEEN CONVICTED OF A FELONY OR PREVIOUSLY HAS HAD A FELONY COMPLAINT PLACED ON FILE. A COMPLAINT MAY BE PLACED ON FILE ONLY AFTER A FINDING OF GUILTY AND WITH THE CONSENT OF THE DEFENDANT.

FILING SHOULD BE USED ONLY WHERE NO IMMEDIATE POSITIVE DISPOSITIONAL ACTION IS DEEMED NECESSARY BY THE COURT. IT CANNOT BE USED IN CONJUNCTION WITH PROBATION.

A FILED COMPLAINT MAY BE BROUGHT FORWARD AT ANY TIME BY THE COURT ON ITS OWN INITIATIVE OR IN RESPONSE TO A MOTION.

COMMENTARY

Filing of a complaint which serves to suspend active proceedings does not constitute a final judgment. Comm. v. Bianco, 390 Mass. 254, 257, 454 N.E.2d 901, 903 (1983).

> Subject to any other provisions of law relative to the filing of complaints for particular crimes, district courts may place on file any complaint in a criminal case other than a complaint for the commission of a felony issued against a person who appears previously to have been convicted of a felony or previously to have had a complaint for felony placed on file.

G.L. c. 218, s. 38.

Certain complaints over which the District Court has jurisdiction may not be placed on file. Examples include G.L. c. 94C, s. 32, charging various drug offenses (s. 32B); G.L. c. 90, s. 24 (1)(a)(1) (driving under the influence of intoxicating liquor or drugs, second or subsequent offense); G.L. c. 266, s. 27A (concealment of a motor vehicle or trailer to defraud an insurer); G.L. c. 269, ss. 10(a) and (c) (gun law); and G.L. c. 272, s. 6 (maintaining a house of prostitution). See Standard 7:10 on mandatory sentencing.

A prosecutor who requests that a case be filed must sign and file a written motion, accompanied by a written statement of the reasons therefor and a statement of any prior criminal record of the accused. The motion must be filed with the pleadings. G.L. c. 277, s. 70B; Comm. v. Marchionda, 385 Mass. 238, 431 N.E.2d 238 (1982).

A complaint may be filed after a guilty finding has been entered as long as the defendant consents to its filing.

> It has long been the practice in this Commonwealth that a judge, after a plea of guilty or a conviction may order that the indictment be placed on file. Commonwealth v. Dowdican's Bail, 115 Mass. 133 (1874). . . . Should a defendant wish to have the case finally disposed of and judgment entered, he may demand that he either be sentenced or discharged. Marks v. Wentworth, 199 Mass. 44, 45, 86 N.E. 81 (1908).

Comm. v. Delgado, 367 Mass. 432, 437-438, 326 N.E.2d 716, 719 (1975). As long as the complaint remains on file, the case cannot be appealed. Costs may be imposed as a condition of filing a complaint. G.L. c. 280, s. 6.

A filed complaint may be brought forward at any time, for any reason, by the court. Marks v. Wentworth, supra. No intervening misconduct need be demonstrated. Comm. v. Bianco, supra. Since a long period may ensue between filing and bringing the complaint forward for disposition, it is recommended that the intended disposition be noted on the case papers. Such an intended disposition should be made known to the defendant.

9:03 Costs and Other Assessments. COSTS MUST NOT BE IMPOSED AS A PENALTY. AS A CONDITION OF THE DISMISSAL OR FILING OF A COMPLAINT OR AS A TERM OF PROBATION, A JUDGE MAY ASSESS AS COSTS THE REASONABLE AND ACTUAL EXPENSES OF THE PROSECUTION. (G.L. c. 280, s. 6).

UNNECESSARY EXPENSES INCURRED BY A PARTY AS A RESULT OF THE GRANTING OF A CONTINUANCE WITHOUT ADEQUATE NOTICE MAY ALSO BE ASSESSED AGAINST THE PARTY OR COUNSEL REQUESTING THE CONTINUANCE, PURSUANT TO MASSACHUSETTS RULE OF CRIMINAL PROCEDURE 10(b).

THE COURT MUST IMPOSE A VICTIM-WITNESS ASSESSMENT AGAINST A DEFENDANT CONVICTED OF AN OFFENSE OR AGAINST WHOM A FINDING OF SUFFICIENT FACTS TO WARRANT A FINDING OF GUILTY IS ENTERED, UNLESS THERE IS SEVERE FINANCIAL HARDSHIP. (G.L. c. 258B, s. 8).

COMMENTARY

General Laws c. 280, s. 6 provides as follows:

> Costs shall not be imposed by the court or justice as penalty or part penalty for a crime; provided that the court or justice may, as a condition of the dismissal or filing of a complaint or indictment, or as a term of probation, order the defendant to pay the reasonable and actual expenses of the prosecution as determined by it or him.

See also G.L. c. 275, s. 6, where the court may order a complainant to pay the expenses of the prosecution of a complaint which is frivolous or malicious.

Assessable costs generally include witness fees, extra compensation paid to witnesses, travel costs, costs of a deposition pursuant to Mass. R. Crim. P. 10(c), and perhaps a stenographer's attendance fee in District Court. See Mass. R. Crim. P. 5(d)(1).

All costs imposed in the disposition of any action, civil or criminal, shall be paid to the State Treasurer. This is in accordance with G.L. c. 280, s. 6.

This technique should not be used as a routine dispositional alternative. District Court Bulletin No. 3-77, Item 13 (May 19, 1977).

Mass. R. Crim. P. 10(b) provides as follows:

> When a continuance is granted upon the motion of either the commonwealth or the defendant without adequate notice to the adverse party, causing the adverse party to incur unnecessary expenses, a judge may in his discretion assess those expenses as costs against the party or counsel requesting the continuance.

See Beit v. Probate and Family Court Department, 385 Mass. 854, 434 N.E.2d 642 (1982).

In the limited circumstances provided for under Mass. R. Crim. P. 10(b), a Judge may assess against a party to the action reimbursement of expenses to cities and towns, to be distributed by the probation office as such. This reimbursement should not be labeled as "costs."

A defendant convicted of an offense or against whom a finding of sufficient facts to warrant a finding of guilty is entered will, in addition to a fine or restitution, be assessed $25.00 for a felony charge and $15.00 for a misdemeanor or a delinquency charge by the Judge. The assessment may be reduced or waived upon a showing of "severe financial hardship." The maximum assessment for multiple offenses arising out of a single incident is $25.00. G.L. c. 258B, s. 8.

See Standard 3:00 on costs imposed in conjunction with a continuance without a finding. Cf. Standard 5:00 on fines.

9:04 Restitution. (G.L. c. 266, ss. 27A, 29, 61, 111B; G.L. c. 276, ss. 87, 92, 92A; G.L. c. 119, ss. 58 and 62). THE TERMS OF MONETARY RESTITUTION ARE TO BE DETERMINED BY THE JUDGE WITH THE ASSISTANCE OF THE PROBATION OFFICE.

COMMENTARY

"Reparation or restitution in criminal cases is consonant with the public policy of the Commonwealth," Novelty Bias Binding Co. v. Shevrin, 342 Mass. 714, 717, 175 N.E.2d 374, 376 (1961), and is authorized by statute. See District Court Bulletin No. 5-77, Item 12 (October 5, 1977).

The amount of monetary restitution must be based on the victim's actual loss, and should encompass only those losses which may be ascertained and measured and are a direct result of the defendant's criminal acts. Durst v. United States, 434 U.S. 542, 98 S.Ct. 849 (1978); People v. Heil, 79 Mich. App. 737, 262 N.W.2d 895 (1978); People v. Becker, 349 Mich. 476, 84 N.W.2d 833 (1963).

The input of the victim of the offense, where obtainable, is particularly useful in cases in which restitution is to be assessed by the Judge. The victim should present documentation of expenses, bills, receipts and other relevant information which may assist the Judge in making an order for restitution, and the prosecutor should present the amount of restitution requested. Additionally, a written victim impact statement prepared by the District Attorney is required if a defendant is convicted either of a felony which has an "identified victim" whose whereabouts are known, or of motor vehicle homicide under G.L. c. 90, s. 24G(b). G.L. c. 279, s. 4B.

Monetary restitution should be distinguished from imposition of a fine. Monetary restitution may exceed the maximum fine for the offense (G.L. c. 119, s. 62), or may be less than the actual damages if a full assessment would be inconsistent with the ability of the defendant to pay over a period of time, or with the rehabilitation of the defendant. See G.L. c. 276, ss. 87 and 92; G.L. c. 266, s. 61.

All of the due process rights associated with the sentencing process apply to the imposition, assessment, and monitoring of monetary restitution payments, Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756 (1973), and the Judge may delegate the determination to the probation office, subject to specific review or approval by the court. The parties should be advised that they will be heard by the court if restitution cannot be agreed to. Although the probation office is the statutory collecting agent, the ultimate responsibility for resolving disputes or questions on the amount or manner of payment rests with the Judge, and the better practice is to inform probationers that any unresolved monetary issues will be determined by the Judge. United States v. Shelby, 573 F.2d 971, 976 (7th Cir. 1978).

In the case of multiple offenders, the prevailing law upholds orders providing for joint and several responsibility for monetary restitution among co-defendants. Relative culpability may be considered in assessing disproportionate orders in such cases. In re D.G.W., 70 N.J. 488, 361 A.2d 513 (1976).

In addition to the direct victim of a defendant's acts, it is generally accepted that the insurer, who has made payments to the victim, is an "indirect victim" who may benefit from an order of restitution. People v. Alexander, 182 Cal. App. 2d 281, 6 Cal. Rptr. 153 (1960). See District Court Bulletin No. 4-83, Item 15 (December 23, 1983).

In the case of a conviction of a defendant under G.L. c. 266, s. 27A (the removal or concealment of a motor vehicle or trailer to defraud an insurer), an order of restitution is required. Whoever is convicted of larceny of a motor vehicle (G.L. c. 266, s. 28), theft of mechanic's tools (G.L. c. 266, s. 27), filing fraudulent motor vehicle insurance claims (G.L. c. 266, s. 111B), or defacement of motor vehicle identifying numbers (G.L. c. 266, s. 139), "shall [be ordered to make restitution] to any person whom the court deems appropriate for any financial loss sustained by the victim of his crime, his dependents or insurer as the result of a commission of a crime . . . ." G.L. c. 276, s. 92A; District Court Bulletin No. 4-80, Item L (July 18, 1980).

As to procedure, the above mentioned statutes call for an evidentiary hearing after conviction to determine financial loss and the defendant's capacity to pay. In assessing the victim's loss, the Judge may consider: lost earnings, out-of-pocket expenses, and replacement costs. "Pain and suffering" is excluded in an assessment of financial loss. In addition, the aggrieved insurer is a victim for restitution purposes.

For a discussion of restitution imposed as a condition of probation, see Standard 4:03.

The Handbook on Alternative Sentencing in the District Court Department (September, 1980) is a useful resource manual on restitution.

9:05 Victim's Opportunity to be Heard. PRIOR TO DISPOSITION, WHERE REQUIRED BY STATUTE AND IN OTHER APPROPRIATE CASES, THE JUDGE SHOULD RECEIVE INFORMATION FROM THE VICTIM OR THE VICTIM'S REPRESENTATIVE THAT MAY ASSIST THE JUDGE IN ARRIVING AT A PROPER DISPOSITION, OR AT LEAST ASCERTAIN THAT THE PROSECUTOR HAS INTERVIEWED THE VICTIM. IF THE VICTIM OR THE VICTIM'S REPRESENTATIVE HAS NOT BEEN NOTIFIED OF THE HEARING, THE CASE SHOULD BE CONTINUED AND THE PROSECUTOR DIRECTED TO GIVE NOTICE OF THE OPPORTUNITY TO BE PRESENT AND TO BE HEARD.

COMMENTARY

In situations where the victim of the offense is unavailable, the family or representative of the victim should be given the opportunity to be present at the hearing. See G.L. c. 279, s. 4B.

A victim or attorney or designated family member may make an oral or written statement to the court prior to disposition of a felony in which there is an identified victim or of motor vehicle homicide pursuant to G.L. c. 90, s. 24G(b). The statement may review the impact of the crime on the victim and the victim's family and may contain a recommended disposition. The defendant must be given an opportunity to rebut the statement if the Judge relies on it in imposing a disposition. G.L. c. 279, s. 4B.

District Court Sentencing Memorandum No. 1 (May 28, 1981), which recommends that the family of a victim of motor vehicle homicide be given an opportunity to be heard, suggests the following:

> [T]he court should receive the views of the victim's family before sentencing, if the family

desires to be heard. In the usual case it is preferable that a family member be heard in open court. Alternatively, the family's views may be received by way of the family's participation in the pre-sentence investigation process or by way of letter. (Any such letter should be retained in the probation file, and copies provided to the Commonwealth and defense counsel prior to disposition.) The Judge should decide the manner in which the victim's family may be heard. At the time the case is continued for sentencing, the Judge, on the record, should direct the Probation Department to inform a responsible family member of the date and time of sentencing and the method by which the family may be heard.

See Standard 9:04 on the input of the victim in restitution cases.

9:06 Sealing of Records. (G.L. c. 276, ss. 100A-100C; G.L. c. 94C, ss. 34, 35 and 44; G.L. c. 127, s. 152). RECORDS MAY BE SEALED BY ORDER OF THE COURT, THROUGH APPLICATION TO THE COMMISSIONER OF PROBATION, AUTOMATICALLY UNDER G.L. c. 276, s. 100C, OR BY DIRECTION OF THE GOVERNOR AFTER ISSUANCE OF A PARDON, IN ACCORDANCE WITH THE APPLICABLE PROVISIONS OF LAW.

SEALED RECORDS ARE INADMISSIBLE IN EVIDENCE IN COURT PROCEEDINGS OR HEARINGS BEFORE ANY BOARDS OR COMMISSIONS. IN THE CASE OF A SEALED RECORD, THE COMMISSIONER OF PROBATION MUST REPORT THAT NO RECORD EXISTS UNLESS THE INQUIRY IS MADE BY A LAW ENFORCEMENT AGENCY, THE COURT OR ANY APPOINTING AUTHORITY.

A SEALED RECORD MAY BE REVIEWED BY THE COURT AFTER A GUILTY FINDING HAS BEEN ENTERED AND PRIOR TO SENTENCING.

COMMENTARY

Court records may be sealed: (1) by order of the court under G.L. c. 276, s. 100C, or G.L. c. 94C, ss. 34, 35 and 44; (2) by the Commissioner of Probation pursuant to a petition under G.L. c. 276, ss. 100A-100B; (3) automatically under G.L. c. 276, s. 100C; or (4) by direction of the Governor after issuance of a pardon under G.L. c. 127, s. 152.

Sealing by Court Order

A defendant may petition the Judge to have a record sealed pursuant to G.L. c. 276, s. 100C, or G.L. c. 94C, ss. 34, 35 and 44. Upon petition, the Judge has discretion to seal the records of the proceedings:

> [i]n any criminal case wherein a nolle prosequi has been entered, or a dismissal has been entered by the court, except in cases in which an order of probation has been terminated, and it appears to the court that substantial justice would best be served.

G.L. c. 276, s. 100C.

A Judge is precluded from sealing the records of a proceeding in which an order of probation has been terminated. G.L. c. 276, s. 100C. Pretrial probation is a form of "probation," so a defendant or juvenile who has been placed on pretrial probation must petition the Commissioner of Probation to have his or her record sealed. G.L. c. 276, ss. 100A-100B.

Upon petition, the Judge must seal the records of a proceeding in which the defendant:

1. was convicted of a first offense of possession of marijuana or a Class E controlled substance, G.L. c. 94C, s. 34;

2. was found not guilty of a violation of G.L. c. 94C, s. 34, or the complaint was dismissed or nol prossed, G.L. c. 94C, s. 44; or

3. was convicted of knowingly being in the presence of a person in possession of heroin, G.L. c. 94C, s. 35.

When records of criminal dispositions are sealed by order of the Judge, the Clerk-Magistrate must notify the Commissioner of Probation and the Probation Officer in the court in which the proceedings occurred, who shall seal their records. G.L. c. 276, s. 100C.

Even though a record of conviction pursuant to G.L. c. 94C, s. 34 had been sealed by the court, it was held that police department records relating to the same incident, possession of marijuana, were admissible into evidence at a hearing on the denial of a request for permission to carry a firearm. Chief of Police of Shelburne v. Moyer, 16 Mass. App. Ct. 543, 545-47, 453 N.E.2d 461, 463-64 (1983).

Sealing by the Commissioner of Probation

A defendant may petition the Commissioner of Probation to have a record sealed under G.L. c. 276, ss. 100A-100B. The Commissioner of Probation must seal a record:

1. of a misdemeanor conviction, if all conditions of the disposition were completed at least ten years prior to the request, and there is compliance with all other conditions of the sealing statute, G.L. c. 276, s. 100A;

2. of a felony conviction, if all conditions of the disposition were completed at least fifteen years prior to the request, and there is compliance with all other conditions of the sealing statute, G.L. c. 276, s. 100A;

3. of an offense which is no longer a crime, G.L. c. 276, s. 100A;

4. of a juvenile delinquency finding, if all conditions of the disposition were completed at least three years prior to the request, G.L. c. 276, s. 100B.

The Commissioner of Probation automatically seals the record of an offense in which there is a not guilty, a no bill or no probable cause was found, unless the defendant makes a written request to the Commissioner not to have the record sealed. In such cases "the clerk and the probation officer of the courts in which the proceedings occurred or were initiated shall likewise seal the records of the proceedings in their files." G.L. c. 276, s. 100C.

When records of criminal or delinquency appearances and dispositions are sealed by the Commissioner of Probation upon petition, the Commissioner must notify the Clerk-Magistrate and Probation Officer of the courts in which the convictions or dispositions were entered, and, in the case of juvenile offenders, the Department of Youth Services, whereupon the Clerk-Magistrates, Probation Officers and Department of Youth Services, are to seal their records of the proceedings. G.L. c. 276, ss. 100A, 100B.

Sealing by Direction of the Governor

The Governor, upon approval of a petition for a pardon, must direct the appropriate officers to seal all records relating to the offense for which the person received the pardon. G.L. c. 127, s. 152.

Unsealing of Court Records

District Court Administrative Regulation No. 1-74 explains in detail the procedure which should be followed by a District

Court Clerk-Magistrate or Probation Officer when sealing or unsealing a criminal or juvenile record or entry.

If a sealed record is unsealed, the date of unsealing and the name of the person using the record should be noted on the front of the envelope, and then the record must be resealed.

A Judge may unseal a record prior to sentencing after a guilty finding has been entered. G.L. c. 276, ss. 100A-100C; G.L. c. 127, s. 152. A defendant may file a motion to have his or her record unsealed in order to obtain a copy of the court's disposition. In all other circumstances, requests for unsealing should be made to the Commissioner of Probation pursuant to G.L. c. 276, s. 100.

The purpose of sealing records is to remove the record of entries from the records of the court that ordinarily are available for public use. Rzeznik v. Chief of Police of Southampton, 374 Mass. 475, 373 N.E.2d 1128 (1978). Additionally, these records are inadmissible in subsequent court proceedings or hearings. G.L. c. 276, ss. 100A-100C; G.L. c. 127, s. 152; G.L. c. 94C, ss. 34 and 44.

Sealing of records should be distinguished from "expungement of the record." The power to expunge records "is a power that properly may be exercised by the courts of the Commonwealth as a necessary adjunct to their exercise of judicial power," and involves an order to remove and destroy records "so that no trace of the information remains." In contrast, sealing of records refers to "those steps taken to segregate certain records from the generality of records and to ensure their confidentiality to the extent specified in the controlling statute." Police Commissioner of Boston v. Municipal Court of Dorchester District, 374 Mass. 640, 648, 660-62, 374 N.E.2d 272, 277, 284 (1978).

9:07 Rendition. (G.L. c. 276, ss. 11-20R). A "FUGITIVE FROM JUSTICE" IS A PERSON CHARGED WITH HAVING COMMITTED A "CRIME," AS DEFINED IN G.L. c. 276, ss. 12 and 13, IN THE DEMANDING STATE AND WITH HAVING LEFT ITS JURISDICTION; OR AFTER CONVICTION OF A CRIME IN THE DEMANDING STATE, WITH HAVING ESCAPED CONFINEMENT OR VIOLATED TERMS OF BAIL, PROBATION OR PAROLE IN THAT STATE.

TO COMPEL THE RETURN OF A FUGITIVE FROM JUSTICE TO THE DEMANDING STATE, THE GOVERNOR MUST ISSUE A RENDITION WARRANT. PRIOR TO THE ISSUANCE OF THE GOVERNOR'S WARRANT, A FUGITIVE FROM JUSTICE MAY BE ARRESTED AND BROUGHT BEFORE A JUDGE FOR EXAMINATION. THE JUDGE MAY COMMIT A FUGITIVE FROM JUSTICE TO A JAIL FOR A PERIOD NOT EXCEEDING THIRTY DAYS, OR, EXCEPT FOR OFFENSES PUNISHABLE BY DEATH OR LIFE IMPRISONMENT, THE FUGITIVE MAY BE ADMITTED TO BAIL AWAITING ISSUANCE OF THE GOVERNOR'S WARRANT. G.L. c. 276, s. 20D. AT THE EXPIRATION OF THIRTY DAYS, IF THE GOVERNOR'S WARRANT HAS NOT BEEN ISSUED, THE JUDGE MAY DISCHARGE THE FUGITIVE, RECOMMIT HIM OR HER FOR A PERIOD NOT TO EXCEED SIXTY DAYS, OR ADMIT THE FUGITIVE TO BAIL FOR SUCH PERIOD.

A FUGITIVE FROM JUSTICE MAY WAIVE ISSUANCE AND SERVICE OF THE GOVERNOR'S WARRANT AND VOLUNTARILY RETURN TO THE DEMANDING STATE.

A FUGITIVE FROM JUSTICE MUST BE INFORMED BY A JUDGE OF THE DEMAND MADE FOR SURRENDER, THE CRIME CHARGED, AND THE RIGHT TO DEMAND AND PROCURE LEGAL COUNSEL. IF THE FUGITIVE DESIRES TO TEST THE LEGALITY OF HIS OR HER ARREST, THE JUDGE MUST SET A REASONABLE TIME WITHIN WHICH THE FUGITIVE MAY APPLY FOR A WRIT OF HABEAS CORPUS. G.L. c. 276, s. 19.

COMMENTARY

Massachusetts has adopted the Uniform Criminal Interstate Rendition Law, G.L. c. 276, ss. 11-20R. "Rendition" refers to the return of fugitives from one state to another and should be distinguished from "extradition," which refers to the return of fugitives from foreign countries in accordance with treaties and international law.

The "crimes" governed by rendition proceedings, Sanchez Maldonedo, petitioner, 364 Mass. 359, 304 N.E.2d 419 (1973), include:

1. treason, felonies, and indictable offenses committed in the demanding state, G.L. c. 276, s. 12; Brown's case, 112 Mass. 409 (1873);

2. after conviction, the escape from confinement or the breaking of terms of bail, probation, or parole in the demanding state, G.L. c. 276, s. 12;

3. the commission of a crime in the Commonwealth or in a third state resulting in a crime in the demanding state, G.L. c. 276, s. 13.

A person subject to rendition proceedings has either been charged with the commission of a crime in another state, or, after conviction of a crime in another state, has escaped confinement or broken terms of bail, probation, or parole in the demanding state. The reasons for the person's flight are immaterial. G.L. c. 276, ss. 12 and 13.

A fugitive from justice may be arrested with or without an arrest warrant prior to issuance of the Governor's warrant in accordance with the following procedures:

1. A Judge, upon oath of a credible person in the Commonwealth or upon affidavit of a credible person in another state, may issue a warrant for the arrest of a fugitive from justice believed to be in the Commonwealth. The alleged fugitive must be formally charged upon a sworn complaint with the commission of a crime in another state; or after conviction of a crime in another state, with escape or breaking terms of bail, probation or parole in the other state. G.L. c. 276, s. 20A. A duly issued warrant for the arrest of the alleged fugitive satisfies the need for an affidavit of a credible person in another state.

2. Upon reasonable information that a person in the Commonwealth has been charged in another state with a crime punishable by death or imprisonment for a term exceeding one year, an officer authorized to serve warrants in criminal cases may arrest the person without a warrant, provided that a complaint under oath before a Clerk-Magistrate or Judge is made with all "practicable speed." G.L. c. 276, s. 20B. Again, a warrant of arrest issued by the demanding state not only establishes "reasonable information," but also probable cause. Comm. v. Sawyer, 389 Mass. 686, 452 N.E.2d 1094 (1983).

When a fugitive from justice is brought before a District Court Judge before the issuance of a Governor's warrant, the Judge should:

1. Ascertain the identity of the person before the court as being the individual sought by the demanding state, Petition of Hamel, 8 Mass. App. Ct. 877, 391 N.E.2d 962 (1979).

2. Determine the existence of a warrant from the demanding state for a crime as defined in G.L. c. 276, ss. 12 and 13, or that probable cause for an offense subject to rendition is being prosecuted by the demanding state.

3. Inform the accused of the demand made for surrender, the crime charged, the right to demand and procure legal counsel and the right to apply for a writ of habeas corpus, G.L. c. 276, s. 19.

4. Inquire whether the accused intends to return voluntarily to the demanding state or, if not, whether the demanding state will send officers to take custody of the accused.

5. Review the necessity of bail. All of the normally relevant considerations bearing on bail are applicable including the statutory limitation on bail in those cases where the punishment in the demanding state is death or life imprisonment, G.L. c. 276, s. 20D.

> Moreover, the Commonwealth's obligations to the demanding State should be recognized. It would be a rare case in which bail would be warranted when the 'fugitive' had escaped from custody in the demanding State or had violated the terms of his release on bail, parole, or probation. Even where the 'fugitive' has not yet been convicted, bail should be granted only in circumstances in which it is reasonably certain that the Commonwealth will be able to fulfill its obligation to turn the fugitive over to the demanding state if he is unsuccessful in his habeas corpus challenge.

Petition of Upton, 387 Mass. 359, 370, 439 N.E.2d 1216, 1223 (1982).

When a fugitive from justice is brought before a District Court Judge and a Governor's warrant has issued for the accused prior to arraignment, the fugitive should be held without bail. Upton, petitioner, supra. If the fugitive has been released previously on bail, bail should be revoked.

After the arrest on a Governor's warrant, the fugitive is in the custody of the arresting officer and not in the custody of the court. The fugitive again should be informed of the following rights: the demand for surrender; the crime charged; the right to demand and procure legal counsel; and the right to test the legality of the arrest by means of a writ of habeas corpus.

If the fugitive or his counsel states a desire to test the legality of the arrest, the Judge should establish a reasonable time in which the prisoner may apply for a writ of habeas corpus. The law does not provide for the fugitive to be bailed once he or she is arrested by the officer on a Governor's warrant.

The question of bail, thereafter, may be entertained only by the Superior Court on a petition for a writ of habeas corpus. Upton, petitioner, supra.

The District Court Judge should endorse the following statement upon the Governor's warrant:

> The within named _____
> was brought before the _____
> District Court on _____, 19___,
> and was informed by said court of the demand
> made for his surrender and of the crime
> with which he is charged and the right to
> demand and procure legal counsel to test
> the legality of his arrest. The court hereby
> fixes as a reasonable time within which the
> said _____ may apply for a writ
> of habeas corpus as _____, 19___,
> at _____ a.m.
>
> _____
> Justice

9:08 Double Jeopardy. THE GUARANTEE AGAINST DOUBLE JEOPARDY IS MANDATED BY THE FEDERAL CONSTITUTION AND BY STATE LAW. G.L. c. 263, ss. 7, 8 and 8A.

A DEFENDANT MAY NOT BE TRIED ON A SECOND COMPLAINT FOR A CRIME ON WHICH HE HAS PREVIOUSLY BEEN TRIED AND ACQUITTED. IF A COMPLAINT HAS BEEN DISMISSED BY REASON OF A DEFECT OF FORM, OR A NON-MATERIAL VARIANCE OF PROOF, THE DEFENDANT MAY BE TRIED AGAIN AND CONVICTED UPON A NEW COMPLAINT.

IN A NON-JURY TRIAL, JEOPARDY ATTACHES WHEN THE FIRST WITNESS IS DULY SWORN.

COMMENTARY

The general rule is that once jeopardy has attached, a defendant may not be retried for the same offense. However, the conviction or acquittal of a defendant in a state court does not bar prosecution of him in a federal court. The converse is also true.

Dismissal of a complaint without a trial on the merits is no bar to a trial for the same offense charged in the dismissed complaint, unless the record discloses that the dismissal was with prejudice against re-trial. Comm. v. Anderson, 220 Mass. 142, 107 N.E. 523 (1915). If the dismissal has been entered without the defendant's consent after witnesses have been sworn, a plea of double jeopardy must be sustained. Comm. v. Micheli, 258 Mass. 89, 154 N.E. 586 (1927).

If a complaint is nol prossed without the defendant's consent after witnesses have been sworn, a plea of double jeopardy will lie. Comm. v. Massod, 350 Mass. 745, 217 N.E.2d 191 (1966); Comm. v. Dasalakis, 246 Mass. 12, 140 N.E. 470 (1923); Mass. R. Crim. P. 16B.

If a defendant has been acquitted as a result of a variance between the complaint or indictment and the proof at trial, the double jeopardy clause does not bar a retrial for the same crime. G.L. c. 263, ss. 7 and 8.

A conviction and sentence by a court of competent jurisdiction bars all other proceedings for the same occurrence, as long as the same operative facts were necessary for the prior conviction. Collateral estoppel precludes a retrial by the state and the individual. Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189 (1970).

A defendant may be convicted of two offenses growing out of a single act if each requires proof of a fact which the other does not. Morey v. Comm., 108 Mass. 433 (1871). In determining whether double jeopardy applies to a trial of a defendant for a similar offense, the test is not whether the defendant has been tried for the same act but whether the defendant could have been convicted in the earlier trial by proof of facts charged in the subsequent complaint or indictment. Comm. v. Azer, 308 Mass. 153, 31 N.E.2d 549 (1941). Of course, if at the time of the first trial, the facts necessary to prove the subsequent offense had not yet occurred or were not known after the exercise of due diligence, double jeopardy does not bar a trial on the second offense. Comm. v. Vanetzian, 350 Mass. 491, 215 N.E.2d 658 (1966).

A trial of a complaint under G.L. c. 273, s. 12 (adjudication of paternty) will not bar a subsequent trial on the same set of facts under G.L. c. 273, s. 15 (non-support of a child) because the former has been held to be civil in nature. Comm. v. Dias, 385 Mass. 455, 432 N.E.2d 506 (1982). A trial under section 15 will bar a subsequent trial under section 12, since non-support proceedings under section 15 have been held to be criminal proceedings. Comm. v. Chase, 385 Mass. 461, 432 N.E.2d 510 (1982). If an adjudication of paternity is made in conjunction with the acquittal of a defendant of a non-support charge under G.L. c. 273, s. 15, the paternity adjudication does not survive. A separate judgment of paternity may be sought under G.L. c. 273, s. 12. Comm. v. Galvin, 388 Mass. 326, 446 N.E.2d 391 (1983).

In order for jeopardy to attach, the court must have had jurisdiction over the offense charged. Comm. v. Murphy, 174 Mass. 369, 54 N.E. 860 (1899). After conviction of an offense in the District Court, a defendant may be prosecuted for a

greater offense over which the District Court does not have jurisdiction. Comm. v. Jones, 288 Mass. 150, 192 N.E. 522 (1934).

A District Court Judge should announce at the outset of a trial of an offense over which the District Court and Superior Court have concurrent jurisdiction whether the proceeding is a trial on the merits or a probable cause hearing. If no announcement is made, the proceeding is considered to be a trial on the merits and jeopardy attaches. The Judge may not subsequently decline jurisdiction, and a subsequent indictment will be barred by double jeopardy principles. Comm. v. Mesrobian, 10 Mass. App. Ct. 355, 407 N.E.2d 1260 (1980); District Court Bulletin No. 6-80, Item 24 (December 8, 1980). But see Comm. v. Gonzalez, 388 Mass. 865, 448 N.E.2d 759 (1983).

A defendant can be retried for an offense when a conviction is set aside on appeal for reasons unrelated to insufficient evidence. Hudson v. Louisiana, 450 U.S. 40, 101 S.Ct. 970 (1981); Aldoupolis v. Comm., 386 Mass. 260, 435 N.E.2d 350 (1982); Hicks v. Comm., 345 Mass. 89, 185 N.E.2d 739 (1962).

9:09 Attempts. (G.L. c. 274, s. 6). AN ATTEMPT TO COMMIT A CRIME IS A CRIME PUNISHABLE IN ACCORDANCE WITH THE APPLICABLE STATUTES.

COMMENTARY

The general statute punishing the crime of "attempt to commit a crime," G.L. c. 274, s. 6, is dependent on the penalty for the underlying offense which is the subject of the attempt. Other statutes provide for punishment of an attempt to commit a specific offense. See, for example, G.L. c. 268, s. 16 (attempt to escape from a penal institution).

In accordance with G.L. c. 274, s. 6, an attempt to commit a crime is punishable as follows:

1. An attempt to commit a crime which is punishable by death is punishable by imprisonment in the state prison for not more than ten years.

2. An attempt to commit a crime (except larceny pursuant to G.L. c. 266, s. 30) which is punishable by imprisonment in the state prison for life or for five years or more is punishable by imprisonment in the state prison for not more than five years or in a jail or house of correction for not more than two and a half years.

3. An attempt to commit a crime (except larceny pursuant to G.L. c. 266, s. 30) which is punishable by imprisonment in the state prison for less than five years or by imprisonment in a jail or house of correction or by a fine is punishable by imprisonment in a jail or house of correction for not more than one year or by a fine of not more than $300.00.

4. An attempt to commit a larceny which is punishable under G.L. c. 266, s. 30 is punishable by imprisonment in a jail or house of correction for not more than two and a half years or by a fine or by both such fine and imprisonment.

The District Court may have jurisdiction over an attempt to commit a specific crime even though it does not have jurisdiction over the underlying offense.

To be considered an "attempt," the act must not be too remote in time but be directed toward the present preparation of the crime, and must approach the perpetration of the crime but not actually accomplish it. The overt act or acts done toward the commission of the crime should be alleged in the complaint. Comm. v. Gosselin, 365 Mass. 116, 309 N.E.2d 844 (1974).